United States Court of Appeals

for the Second Circuit

APPENDIX

Docket Number 75-7356

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
- - - - - - - - - - - - - - - - - - - -X



In the Matter of the Arbitration
between

ROBERT P. HERZOG

Petitioner-Appellee

v.

FRANK ROBINSON

Respondent-Appellant

- - - - - - - - - - - - - - - - - - - -X

APPEAL
FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

GEORGE T. VOGEL,
BERNARD RACKEAR, PROFESSIONAL
CORPORATION
Attorneys for Respondent-
Appellant
25 West 43rd Street
New York, New York 10036
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PAGINATION AS IN ORIGINAL COPY

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DIST./OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	N.S	O	R	R 23	DEMAND $	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
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PLAINTIFFS | DEFENDANTS MAC MAHON J.

In the Matter of The Arbitration between | FRANK ROBINSON

ROBERT P. HERZOG

6/11

CAUSE

Action To Confirm Or Vacate Or Modify Aribbration Award.

nw

ATTORNEYS

ROBERT P. HERZOG, ESQ.
Petitioner Pro Se
185 Madison Avenue
New York, N.Y. 10016
725-0001

BERNARD RACKEAR
25 West 43rd Street
New York, N.Y. 10036
868-4470

UNITED STATES COURT OF APPEALS
FILED
JUL 21 1975

APPENDIX - PAGE 1

CHECK HERE	DATE	FILING FEES PAID RECEIPT NUMBER	CLERK NUMBER	STATISTICAL CARDS CARD	DATE MAILED
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				JS 6	x

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev 1/75)

DATE	NR.	PROCEEDINGS
01-23-75		Filed Petition of Removal from Supreme Court of State of New York-County of N.Y.
01-03-75		Filed Removal Bond,----The AETNA CASUALTY AND SURETY COMPANY.
01-03-75		Filed respondents affdvt & notice of motion to dismiss the petition. Ret. 1-24-75, Rm. 706, 2:15 P.M.
01-09-75		Filed Respondents notice of filing of petition for removal & Bond.
01-20-75		Filed petitioner's notice of petition for an order confirming the award of the Arbitrators & directing that judgment be entered. Ret. 1-24-75, Rm 706, 2:15 P.M. Copy served by Marshal on Frank Robinson, by Mary Jo Robinson, 1-14-75.
01-22-75		Filed Memo-End. & Order on motion of 1-8-75. Motion withdrawn. See Stip & Order dated 1-16-75.....MAC MAHON,J. m/n
01-22-75		Filed Stip & Order (1) Respondent withdraws motion to dismiss ret. 1-24-75. (2) He acknowledges service on 1-14-75 in Calif. of a copy of petitioners motion to confirm arbitration award, ret 1-24-75, (3) He shall by 2-14-75 serve any opposition or cross-move to vacate or modify said award &. (4) Petitioners motion to confirm shall be adjourned to 2-14-75.....MAC MAHON,J.
02-18-75		Filed Stip & Order adjourning to 2-28-75 petitioners motion to confirm. respondat shall by 2-20-75, ~~to~~ serve any papers in opposition. MAC MAH(
02-21-75		Filed Respondents affdvt & Notice ofMotion to vacate certain arbitratic award dated 11-27-74. Ret. 2-28-75
02-21-75		Filed Respondents memo of law in opposition to petitioners motion to confirm & in support of motion to vacate award.
03-4-75		Filed petitioners affdvt in opposition to respondents cross-motion of 2-20-75.
03-4-75		Filed petitioners reply memo of law in support of petitioners motion to confirm the arbitration award.
3-2-75		Filed Memo-End. on petition of 1-20-75. Motion to confirm the arbitration award is granted. See memorandum decision of this date..... MAC MAHON,J m/n
3-2-75		Filed respondents reply memo in support of motion to vacate arbitration award.
3-2-75		Filed respondents affdvt in reply to petitioners affdvt in opposition.
3-2-75		Filed Memo-End. on motion of 2-21-75. Motion to vacate the arbitration award is denied. See memorandum decision of this date..... MAC MAHON,J m/n

Con't on Page #2

CIVIL DOCKET Page #2 MAC MAHON

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT RECEIPTED IN EMOLUMENT RETURNS
May 2-75	Filed Memorandum #42345. Petitioner seeks to confirm an arbitration award. Respondent cross-moves for an order vacating the award. The petition is here followong removal from the state court, & there is no dispute respecting removal jurisdiction. For reasons stated in the memorandum, Herzog's petition to confirm the arbitration award & enter judgment thereon is granted. Robinson's cross-motion to vacate the award is denied. Submit judgment within ten days. MAC MAHON,J m/n			
May 14-75	Filed Order & Judgment #75,431, that application of Robert P. Herzog confirming an award dated 11-27-74 is granted. Application of Frank Robinson to vacate arbitration award of 11-27-74 is denied. Award of (Buckstein, Greenberg & Tecklin) dated 11-27-74 is confirmed. Robert P. Herzog recover judgment against respondent for a total sum of $52,225.00. American Arbitration Assoc. recover judgment against respondent in the sum of $750. Petitioner Herzog to recover of respondent his costs & disbursements herein to be taxed by the Clerk of the Court.....MAC MAHON,J Judgment Ent. 5-14-75, Clerk m/n			
Jun.11-75	Filed notice of appeal by respondent Frank Robinson, to the USCA, from each & every part of the Judgment of 5-14-75. Copy sent to Robert P. Herzog, 185 Madison Ave., New York, N.Y. 10016			
Jun 11-75	Filed by Respondent bond for costs on appeal $250 - The Aetna Casualty & Surety Co.			

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By E. Agnello
Deputy Clerk

OFFER

THE UNDERSIGNED, FRANK ROBINSON, residing at 1320 Morningside Drive, Burbank, California, makes the following offer to the Creditors of FRANK ROBINSON ADVERTISING, INC. (FRA, INC.)

W I T N E S S E T H :

WHEREAS, the FRANK ROBINSON ADVERTISING, INC., is originally indebted to its general and unsecured creditors, and

WHEREAS, on the _____ day of October, 1972, the FRA, INC. entered into a Moratorium Agreement with its creditors; and

WHEREAS, the FRA, INC. has paid certain sums of monies to its creditors, and

WHEREAS, said Moratorium Agreement is presently in default and in connection therewith, Robert P. Herzog and James Jurist, as Trustees, have filed a Notice of Foreclosure on all of the personal property of FRANK ROBINSON ADVERTISING, INC., which foreclosure sale is scheduled to be held on the 27th day of August, 1973, at 2:00 o'clock in the afternoon; and

WHEREAS, said Trustees have called a special meeting of the stockholders of FRANK ROBINSON ADVERTISING, INC. and PLASTIMAID, INC. to be held on the 27th day of August, 1973; and

WHEREAS, it is the desire of FRANK ROBINSON, the individual, to make the following offer on account of FRANK ROBINSON ADVERTISING, INC., and final settlement with the same as hereinafter set forth.

OFFER NUMBER 1

The presently existing creditors of FRANK ROBINSON ADVERTISING, INC. are hereby offered an additional ten percent (10%) cash, based upon their respective indebtednesses as of the date of the original Moratorium Agreement above referred to, infull settlement, satisfaction, remise, release and discharge thereof; or

ALTERNATIVE OFFER NUMBER 2

The presently existing creditors of FRANK ROBINSON ADVERTISING, INC., are hereby offered a five percent (5%) cash payment and a twenty percent (20%) deferred payment without interest, payable in five (5) installments of four percent (4%) each, evidenced by a series of promissory notes with acceleration provisions, commencing March 30, 1974, and each and every three (3) months thereafter until paid in full settlement, satisfaction, remise, release and discharge thereof.

The above offer is conditioned upon acceptance by eighty percent (80%) of the amount of creditors as at the date hereof.

In the event acceptances of less than eighty percent (80%) of the amount owed creditors is obtained, then the Offeror may have the option of accepting same or terminating this ~~Agreement~~ offer, in which later event all deposits made under this Offer and any rental instruments executed in connection with this offer shall be returned to the Offeror, forthwith.

DEPOSIT ON OFFER

As evidence of the Offeror's bona fides the offeror herewith deposits with Robert P. Herzog, as Escrowee, the receipt of which is hereby acknowledged, a promissory note of even date and a deed and an assignment of lease of even date as collateral to guarantee payment of the said promissory note. In the event eighty percent (80%) of the creditors, as set forth hereinabove, accept the offer as made herein, the said promissory note will become due and payable in accordance with its terms. In the event the requisite number of creditors do not accept the said offer, the said promissory note and collateral, above set forth, shall be forthwith returned for cancellation to the offeror by the Escrowee.

TIME FOR ACCEPTANCE

This offer is irrevocable but shall expire on November 30, 1973, unless further extended by Offeror.

UNDERTAKING BY OFFEROR

THE Offeror undertakes and agrees to complete and provide to the Committee of Creditors a report to be made by Clarence Rainess & Co., of the financial condition of FRANK ROBINSON ADVERTISING, INC., and PLASTIMAID CORPORATION, within forty-five days hereof. At the same time, the Offeror agrees to submit a statement of his personal net worth, under oath. It being expressly understood that the total expenditures by ~~ROBINSON~~ FRA, Inc. - AR in connection with said accounting shall not exceed the sum of $7,500.00.

ADDITIONAL PROVISIONS

All accepting creditors will release and discharge FRANK ROBINSON, an individual, personally, from all actions, causes of actions, of whatsoever kind or nature and discharge him from any and all personal liabilities, if any, of FRANK ROBINSON ADVERTISING, INC., and/or

PLASTIMAID CORPORATION, which discharge shall include waiver of § 1542 of the Civil Code of the State of California which provides as follows:

> "Certain claims not affected by a general release.
>
> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the Debtor."

The accepting creditors agree to return to ROBINSON all of the outstanding stock in PLASTIMAID CORPORATION which had heretofore been pledged under the Moratorium Agreement.

FORFEITURE PROVISIONS

In the event eighty percent (80%) of the creditors accept the within offer, in accordance with the terms hereof, and ROBINSON fails to deposit with the Escrowee the necessary consideration in the form of cash and notes to effectuate this offer upon its acceptance, then the said instruments, consisting of promissory note and collateral will be forfeited to the existing creditors of FRANK ROBINSON ADVERTISING, INC., to the extent of $50,000.00 after expenses. In the event that the Escrow holder is required to proceed to sell and there are proceeds realized over and above the $50,000.00 deposit, after reasonable expenses, then the balance of proceeds, if any, shall be turned over to the Offeror.

DISCLAIMER

In making this offer, the Offeror acknowledges that there is existing a Moratorium Agreement which is presently in default and that this offer is not intended to alter, modify, change or amend said Moratorium Agreement or any of its provisions, until and unless, said offer is acccepted by the requisite amount of creditors. It is the intention of the parties that in the event that this offer is not accepted this offer and all instruments executed in connection herewith shall be deemed null and void and of no legal force and effect and that the Moratorium Agreement heretofore entered remains operative and in default by the sole and existing agreement.

ARBITRATION

In the event this offer is accepted by the requisite number of creditors that disputes or controversies arising out of the said Offer or its acceptance, including any of its provisions or performance, shall be submitted for Arbitration under the Commercial Arbitration Rules of the American Arbitration Association in New York County, New York or Los Angeles County, California.

Dated at Los Angeles, California, this 27th day of August, 1973.

Frank E. Robinson

FRANK E. ROBINSON,
Offeror

The undersigned, as wife of the Offeror, consents hereto to the extent of the collateral pledged, without personal liability.

Mari-Jo Robinson

MARI-JO ROBINSON,
Wife of Offeror.

AMERICAN ARBITRATION ASSOCIATION
CASE No.
JUL 29
No. C1
EXHIBIT

ROBERT P. HERZOG
COUNSELLOR AT LAW
185 MADISON AVENUE
NEW YORK, N.Y. 10016
(212) 725-0001

September 14th, 1973

TO THE CREDITORS OF:

RE: FRANK ROBINSON ADVERTISING, INC.

HISTORY: As you are aware a payment was due in March, 1973 of 40%, of which only a portion was paid. To date all payments made to creditors aggregates approximately 24½% of each creditor's original receivable.

When it became evident to the committee that the debtor could not meet the obligations of the moratorium agreement, previously accepted by creditors, the commitee initiated a series of meetings with the debtor, which continued for several months. The committee declared the moratorium agreement in default to protect the rights of all creditors.

Examination of the present condition of the debtor indicated that liquidation of the debtor and its affiliates at this time would not have produced any significant additional monies for creditors because of prior secured bank loans.

In lieu of immediate liquidation of the debtor, Mr. Frank Robinson, as the interested individual, has proposed an offer described hereinafter, which for the first time contemplates the involvement of his personal assets.

SUBSTITUTE OFFER SUMMARIZED: As a result of the intensive negotiations mentioned above, the committee was successful in obtaining a substitute offer from Mr. Frank Robinson, as an individual, which if accepted by creditors will replace the prior moratorium agreement of October, 1972. The substitute offer, one or the other of which must be chosen, is as follows:

ALTERNATIVE OFFER #1

Creditors are offered 10% in cash, in full and final payment of their original receivable, as at the date of the prior moratorium agreement (October, 1972), payable upon acceptance by the requisite amount of the creditors; or

ALTERNATIVE OFFER #2

Creditors are offered 5% in cash, and a deferred payment of 20%, payable 4% every 3 months commencing March, 1974, which is to be evidenced by a series of promissory notes of the debtor with acceleration provisions in the event of default, in full and final payment of their original receivable as at the date of the prior moratorium agreement (October, 1972) payable upon acceptance by the requisite amount of the creditors.

CREDITORS WHO WISH TO ACCEPT MUST CHOOSE ONE OF THE TWO ALTERNATIVE OFFERS. FAILURE TO RETURN A SIGNED ACCEPTANCE OF ONE OF THESE OFFERS WILL BE DEEMED TO CONSTITUTE A REJECTION

CONDITIONS OF THE SUBSTITUTE OFFER:

a) Mr. Robinson has deposited the equivalent of $50,000.00 in escrow with counsel to the committee. If the substitute offer is accepted by the requisite amount of creditors and the required cash payment, 10% or 5% as may be applicable, is not received, this $50,000.00 will be forfeited to creditors.

b) By the terms of the substitute offer the committee must receive acceptance by creditors, of either one of the payment arrangements, of no less than 80% of the amount owed.

c) A financial statement of the debtor and its affiliates will be submitted to the committee, which is presently being prepared by the accountants for the committee, Clarence Rainess & Co. of Los Angeles, California.

d) The accepting creditors must also agree to generally release Mr. Frank Robinson, an individual, pursuant to the provisions of California law.

e) Accepting creditors of the debtor agree to arbitration in the event of a dispute.

TIME FOR ACCEPTANCE: Acceptance by executing the form annexed must be received not later than Monday, October 22nd, 1973.

COMMITTEE'S RECOMMENDATION: The committee recommends acceptance of the substitute offer in lieu of a non productive liquidation of the debtor. It is for each accepting creditor to individually decide which one of the alternative offers to choose. Failure to accept constitutes a rejection of the substitute offer.

In order for the substitute offer to become effective, 80% of the amount of creditors must accept same.

Very truly yours,

JAMES A. JURIST,
Chairman,

ROBERT P. HERZOG,
Counsel to Committee

CREDITORS' COMMITTEE

James A. Jurist-Chairman	representing John Blair & Co.
Kay Johnson	representing TeleRep, Inc.
John J. Rasche	representing American Broadcasting Co.
Robert Underwood	representing Avery-Knodel, Inc.
Anthony N. Grego	representing Television Advertising Representatives, Inc.
A. J. Carrature	representing RKO General
Fred Cige	representing Metromedia, Inc.
Lawrence Loiello	representing Peters Griffin Woodward, Inc.
Sam Foil	representing The Katz Agency

----------x

In the Matter of

FRANK ROBINSON ADVERTISING, INC.

ACCEPTANCE OF OFFER OF FRANK ROBINSON

----------x

The undersigned, an unsecured creditor of FRANK ROBINSON ADVERTISING, INC., located at 6835 Valjean Avenue, Van Nuys, California, hereby accepts in full settlement of its claim against said FRANK ROBINSON ADVERTISING, INC.,

☐ Alternative offer #1 (10% cash),

or,

☐ Alternative offer #2 (5% cash and 20% deferred),

made by FRANK ROBINSON, dated August 27th, 1973 as summarized in the letter to creditors, dated September 14th, 1973.

In further consideration thereof, the undersigned hereby releases and discharges FRANK ROBINSON individually and personally from all things, actions and causes of action of whatsoever kind or nature, (except for all obligations resulting from the acceptance of his offer, dated August 27th, 1973), including waiver of Section 1542 of the Civil Code of the State of California, which provides as follows:

> "Certain claims not effected by a general release. A general release does not extend to claims, which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially effected his settlement with the Debtor."

Dated: _____

_____
Creditor's Corporate name

_____
Station call letters

_____
Address

By _____

_____
Title of person signing

IMPORTANT:

Return before October 25th, 1973 to:

ROBERT P. HERZOG, ESQ.
185 Madison Avenue
New York, New York 10016

DEMAND FOR ARBITRATION

TO: FRANK ROBINSON
1320 Morningside Drive
Burbank, California

New York, New York
February 4, 1974

The below named escrowee, a Party to an Arbitration Agreement, contained in a writing, dated August 27, 1973 which agreement provides as follows:

> "In the event this offer is accepted by the requisite number of creditors that disputes or controversies arising out of the said Offer or its acceptance, including any of its provisions or performance, shall be submitted for Arbitration under the Commercial Arbitration Rules of the American Arbitration Association in New York County, New York or Los Angeles County, California."

hereby demands arbitration thereunder.

Nature of Dispute: Breach

Claim or Relief Sought: $50,000.00 together with expenses.

Hearing Locale Requested: New York County, New York

You are hereby notified that copies of The Arbitration Agreement had of this demand are being filed with the American Arbitration Association at its New York County Regional Office, with the request that it commence the administration of the arbitration. Under Section 7 of the Commercial Arbitration Rules, you may file an answering statement within seven (7) days after notice from the administrator.

Please take further notice, that pursuant to the New York Civil Practice Law and Rules, §7503(c) unless the

party served applies to stay arbitration within twenty (20) days after service hereof, the said party shall hereinafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time.

/s/ Robert P. Herzog
ROBERT P. HERZOG
185 Madison Avenue
New York, N. Y.
(212) 725-0001
Escrowee Under Agreement

AMERICAN ARBITRATION ASSOCIATION

----------x

In the Matter of the Arbitration
between

ROBERT P. HERZOG,

Claimant,

and

FRANK ROBINSON,

Respondent.

----------x

Case No. 1310-0350-74

ANSWER AND COUNTERCLAIM

The Respondent, by its attorneys, answering the Claimant's "Demand for Arbitration" dated February 4, 1974:

(a) Generally denies the allegations of said Demand for Arbitration;

(b) and, without limiting the foregoing, specifically denies that the "writing, dated August 27, 1973" matured into a binding agreement and that its provisions are enforceable against the Respondent.

As And For A Counterclaim

Respondent counterclaims for the return of the promissory note and collateral deposited with Claimant as escrowee pursuant to said writing and an escrow receipt also dated August 27, 1973.

Respectfully submitted,

DOLIN & ROTHMAN
5670 Wilshire Boulevard
Los Angeles, California 90036

and

BERNARD RACKEAR, PROFESSIONAL CORPORATION
25 West 43rd Street
New York, New York 10036

Attorneys for Respondent

TO:
ROBERT P. HERZOG, ESQ.
185 Madison Avenue
New York, New York

Claimant and
Attorney Pro Se

AMERICAN ARBITRATION ASSOCIATION

JUL 29 1974

No. Cont 8 EXHIBIT

In the Matter of the Arbitration between

Case No. 1310-0350-74

ROBERT P. HERZOG,

Claimant,

and

FRANK ROBINSON,

Respondent.

MOTION

Respondent moves that all proceedings herein be adjourned on the ground that all necessary parties have not been given notice of these proceedings and an opportunity to participate.

Alternatively, Respondent moves that these proceedings be dismissed without prejudice because all necessary parties have not been given notice of these proceedings nor an opportunity to participate.

Respectfully submitted,

DOLIN & ROTHMAN
5670 Wilshire Boulevard
Los Angeles, California 90036

and

BERNARD RACKEAR, PROFESSIONAL CORPORATION
25 West 43rd Street
New York, New York 10036

Attorneys for Respondent

TO:

ROBERT P. HERZOG, ESQ.
185 Madison Avenue
New York, New York

Claimant and Attorney Pro Se

AMERICAN ARBITRATION ASSOCIATION

- - - - - - - - - - - - - - - - - - - -X

In the Matter of the Arbitration between

Case No. 1310-0350-74

ROBERT P. HERZOG,

Claimant

and

FRANK ROBINSON,

Respondent

- - - - - - - - - - - - - - - - - - - -X

RESPONDENT'S MEMORANDUM ON JOINDER

Proceedings to date.

Claimant Robert P. Herzog as "Escrowee under Agreement" has initiated this arbitration proceeding before the American Arbitration Association ("AAA") claiming "Breach" of a "writing dated August 27, 1973". The writing ("Offer") referred to in the "Demand for Arbitration" is subscribed by respondent Frank E. Robinson as "Offeror" and by his wife Mari-Jo Robinson (without personal liability). The Offer is not subscribed by any other person.

The Offer is addressed to the Creditors of Frank Robinson Advertising, Inc. ("FRA") and inter alia was "conditioned upon acceptance by eighty per-cent (80%) of the amount of creditors" as of August 27, 1973 (page 2).

Claimant alleges that he "received the necessary signed acceptances of the respondent's offer" (Statement of the Case p. 3). Respondent disputes this allegation. Respondent disputes not only whether the required number of acceptances were received before the Offer expired by its terms, but also denies that there was a meeting of the minds between the Offeror and the purported acceptors which matured into an agreement. Respondent maintains that the terms and conditions of the acceptances received by claimant differ as to both substance and form from the terms and conditions of the Offer, and that accordingly the purported acceptances merely constituted at best a counteroffer which the Respondent did not accept. Respondent further disputes Claimant's various interpretations of the Offer and Claimant's standing as a stakeholder (escrowee) to claim "Breach". Even if - as Respondent denies - the Offer and acceptances constituted an agreement, Respondent denies the enforceability of the forfeiture provisions of the purported agreement as against the Respondent.

Respondent has demanded - and counterclaims herein for - the return of the deposit (promissory note and collateral) made under the Offer.

To date the only persons whom the AAA have made parties to the proceeding have been Mr. Herzog and Mr. Robinson.

At the hearing of July 15 Respondnet's counsel raised the question as to whether the proceeding, in its present posture,

was defective because all of the necessary parties have not been joined (Transcript p. 40). The arbitrators indicated that they would entertain a brief on this subject. Accordingly, this memorandum is submitted. It is directed solely to the question of joinder and does not address the other substantive questions herein such as the effect of the Offer and the purported acceptances.

> The so-called accepting creditors, as parties to the purported agreement and as claimants to the deposit made thereunder, must be joined herein as necessary parties.

It would seem elementary procedural due process that where, as here, there is a dispute involving the effect of a purported agreement and the interpretation thereof, that at the very least all of the parties (offerors and purported acceptors) to the purported agreement are necessary parties to the dispute and must receive both (a) notice of the inititation of proceedings and (b) an opportunity to participate before the tribunal which is to rule on the effect thereof. If all parties are not joined, those parties not before the tribunal would not be bound by the award of the tribunal. Moreover, those parties before the tribunal might be exposed to double, multiple or otherwise inconsistent obligations by reason of conflict between the award of the tribunal and judgments of other forums which parties who were not joined may seek relief.

Because of the foregoing considerations both the offeror and purported acceptors would under New York practice be "Parties who should be joined" who "shall be made plaintiffs or defendants" (CPLR 1001(a)).* Non-joinder of a party who should be joined is a ground for dismissal of an action without prejudice (CPLR 1003). Similarly under Federal practice the offeror and purported acceptors would be "persons needed for just adjudication" and the court "shall order that he be made a party" (FRCP 19(a)).*

Such joinder is particularly required where, as here, Mr. Herzog is a stakeholder who alleges he is subject to multiple liability as the result of adverse claims. Under New York State Practice (CPLR 1006(a)) the action is intended to be instituted only if two or more of the adverse claimants are joined. Under Federal Practice the several adverse claimants would be joined (FRCP 19(a), 22, 3A Moore's Federal Practice ¶19.08; 22.14).

Joinder is Feasible.

Assuming (as claimant undoubtedly maintains) but not conceding, that all of the purported acceptors have (i) agreed to arbitration (ii) before the AAA and (iii) in New York, joinder of the offerors and acceptors would be feasible and relatively simple, expeditious and inexpensive because such joinder can be effected by mail regardless of the jurisdiction in which the party joined is located. Moreover, even if creditors may not have

* The text of the provisions of the New York Civil Practice Laws and Rules, the Federal Rules of Civil Procedure and the United States Code referred to herein may be found in the Appendix (pages A-1 to A-4) annexed hereto.

heretofore accepted theoffer and agreed to arbitration, they may on notice seek to become a party before this tribunal to protect any interest they may claim which may be affected by the proceedings herein.

There is a further compelling reason why the purported acceptors must be joined. The Commercial Arbitration Rules of the AAA require such joinder by stating that "The AAA shall give notice" of initiation of the proceedings "to the other party" (Section 7). Moreover, "each party" is entitled to notice of the time and place of the hearing (Rules Section 20, cf CPLR 7506(b)). Failure to grant such notice is a ground for vacating an award of the arbitration as is failure to make a mutual, final and definite award (Section 7511(b) (iii), (iv) and 9 USC §10(d); Petrol Corporation v. Groupement D'Achat Des Carburants, 84 F. Supp. 446, 448 (USDC, SDNY, 1949 Rifkind, D.J.) citing Seldner Corporation v. W.R. Grace & Co., 22 F. Supp. 388, 392 (D. Maryland, 1938, Chestnut, D.J.).

Both the claimant in his capacity as stakeholder and the Respondent are before this tribunal. However, to Respondent's knowledge no other person has been made a party to these proceedings. Specifically, none of the purported acceptors of the Offer has been made a party to this proceeding. Nor has Mari-Jo Robinson, Wife of the Offeror (who under California community property law has an interest in the collateral pledged or deposited under the agreement), been made a party. These parties are real parties in

interest and should be joined as necessary and indispensable parties.

Respondent is not aware of any other person who may be a necessary and indispensable party. In this connection, it is noted that the Claimant refers to a nine member so-called "Creditors Committee" with whose "authorization" he claims to act (Statement of the Case p. 3). But, the Claimant has not acted to have the "Creditors Committee" made a party to this arbitration.

Respondent does not concede that the "Creditors Committee" is a proper party to this proceeding or that it has any independent standing to be heard. Of course, the individual creditor members thereof, if joined herein, can be heard on the purported acceptance of the offer. In the absence of such joinder of members of the "Creditors Committee", Claimant a fortiori can have no standing herein to represent or act for it in any capacity (whether as a purported Trustee or its purported Counsel or otherwise) or to claim "breach" of the agreement or to testify on its behalf.

Conclusion

All proceedings herein should be adjourned until all necessary parties have been given notice of these proceedings and an opportunity to participate. Alternatively, the proceedings should be dismissed without prejudice.

Respectfully submitted,

DOLIN & ROTHMAN
5670 Wilshire Boulevard
Los Angeles, California 90036

and

BERNARD RACKEAR, PROFESSIONAL CORPORATION
25 West 43rd Street
New York, New York 10036

Attorneys for Respondent

A P P E N D I X

§ 1001. Necessary joinder of parties

(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

(b) When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;

2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

3. whether and by whom prejudice might have been avoided or may in the future be avoided;

4. the feasibility of a protective provision by order of the court or in the judgment; and

5. whether an effective judgment may be rendered in the absence of the person who is not joined.

§ 1003. Nonjoinder and misjoinder of parties

Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without him under the provisions of that rule. Misjoinder of parties is not a ground for dismissal of an action. Parties may be added or dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just. The court may order any claim against a party severed and proceeded with separately.

Rule 19. Joinder of Persons Needed for Just Adjudication.

(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)--(2) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

§ 1006. Interpleader

(a) Stakeholder; claimant; action of interpleader. A stakeholder is a person who is or may be exposed to multiple liability as the result of adverse claims. A claimant is a person who has made or may be expected to make such a claim. A stakeholder may commence an action of interpleader against two or more claimants.

Rule 22. Interpleader.

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

§ 7506. Hearing

(a) Oath of arbitrator. Before hearing any testimony, an arbitrator shall be sworn to hear and decide the controversy faithfully and fairly by an officer authorized to administer an oath.

(b) Time and place. The arbitrator shall appoint a time and place for the hearing and notify the parties in writing personally or by registered or certified mail not less than eight days before the hearing. The arbitrator may adjourn or postpone the hearing. The court, upon application of any party, may direct the arbitrator to proceed promptly with the hearing and determination of the controversy.

(c) Evidence. The parties are entitled to be heard, to present evidence and to cross-examine witnesses. Notwithstanding the failure of a party duly notified to appear, the arbitrator may hear and determine the controversy upon the evidence produced.

(d) Representation by attorney. A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. This right may not be waived. If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney.

§ 7511. Vacating or modifying award

(a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

offeror and the acceptors, at least as to the provision dealing with subjecting themselves to arbitration, and based upon both of these points, we, therefore, move that these provisions be dismissed for lack of jurisdiction after a determination of the question of whether or not there are 80 percent and then going into the other question, of no meeting of minds between the offerer and the acceptors.

MR. GREENBURG: Now, let me ask you this: Other than the issues of the proper parties and of jurisdiction, as you call it, do you have any other defense to the claim instituted by Mr. Herzog?

MR. PACKEAR: I think, Mr. Vogel, do you want to address yourself to that?

MR. VOGEL: Well, yes, we have substantive defenses, assuming we understand the claim.

But basically, one of them was mentioned by Mr. Packear. There was no meeting of the minds.

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Another one is that the particular provisions are unenforceable as against the respondent.

MR. GREENBURG: Any others?

MR. ROTHMAN: No, I think that we should amplify that by the subject that Mr. Rackear has been discussing, which we call jurisdiction, I think also cuts across the entire matter in that the offer itself is a conditioned offer and that those conditions must be met.

And while Mr. Rackear has illustrated the ambiguities of the document, I think that in any event even if it could be construed and interpreted in the final analysis, it comes down to there are conditions and it is our position that those conditions have not been met and, therefore, the offer has not been accepted.

MR. GREENBURG: In other words, properly put, this is not a jurisdictional argument. It is a question of whether in fact there is a contract, a contract under which there is a dispute which is subject to

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arbitration? If you don't have the requisite number of acceptances, you don't have a contract, and, therefore, there is no dispute which can be arbitrated?

MR. ROTHMAN: I think you state it correctly, Mr. Greenburg. But we are using the denomination of jurisdiction as well.

MR. GREENBURG: I don't think that is a good application. I think to challenge the jurisdiction of the Association was something that you could have done prior to the proceeding. But since we are in the proceeding your argument is in effect that the offer wasn't accepted and not that the Association doesn't have jurisdiction to determine that issue.

MR. ROTHMAN: No. You are correct. It is not our position that you have no jurisdiction to determine any issue.

It is our position that you have jurisdiction to determine that the document which attempts to invoke arbitration has a condition which has not been met and that is entirely independent of the fact that

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there may not be sufficient consent for the agreement to have gone into effect, but simply that for whatever the reason the parties had, they just didn't say that if there is any dispute under this document they will be arbitrated. It says that, "in the event the requisite number of acceptances are received," then they will be arbitrated.

I don't think we can ignore the presence of thatlanguage in the document.

So it is perhaps saying the same thing in two different ways, but I think you get the import of the argument.

MR. GREENBURG: I think you ought to stay away from the word "jurisdiction," because if we were to determine, for example, that the agreement was not accepted by the requisite number of creditors, you would want that to be a binding determination, which you could enforce.

MR. ROTHMAN: Yes.

MR. RACKEAR: We want a binding effect.

MR. GREENBURG: It is not a

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question of lacking jurisdiction; it is a question of whether the offer was accepted.

MR. ROTHMAN: In the sense that you state it, I would agree.

MR. TECKLIN: Which goes into the merits of the case which we have to hear.

MR. ROTHMAN: Yes, but I --

MR. TECKLIN: Give testimony on these issues.

MR. ROTHMAN: Perhaps, let me try to cast it, Mr. Tecklin, in another light.

If we were in a court, we might move the court, at least under California procedure, and I believe applicable under New York procedures, in effect to kind of bifurcate the hearing.

Let's first determine whether there is a contract to be enforced and in that sense the argument, which we have denominated as jurisdictional, is the affirmative thing that ought to be determined, I think.

MR. TECKLIN: All right, Mr. Rothman, I think we would like to proceed with Mr. Herzog's address to any of these issues.

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and if you wish to comment, you may, otherwise you can proceed with your case, Mr. Herzog.

MR. HERZOG: I think Mr. Greenburg has put his finger on the issue here, no motion was made to stay arbitration, and there are state laws and under the laws of most states unless such a motion is made and under federal law the arbitrators have jurisdiction to determine their jurisdiction, if you want to use that kind of a thing, and full jurisdiction to determine whether the arbitration agreement is enforceable, and if they determined it is enforceable, then the natural consequences of that determination follow.

I might also point out to the arbitrators that at no time have I heard in the opening statement any issue of fraud being raised here and so the consequences of a lack of fraud allegation also lie before the arbitrators. I don't believe any of the issues raised by the respondent relate to fraud. They relate perhaps to ambiguities,

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and where a contract is ambiguous, obviously the intent of the parties and the written word will be interpreted by the arbitrators to arrive at whatever result they do.

With regard to the parties to the agreement, I certainly, as escrowee am a party to the agreement.

The question of whether there was a valid acceptances here under the terms of this agreement, if there was a default by the respondent, determine the action that I, as an escrowee, must take regarding the offer.

If there was a valid offer, a valid arbitration contract, a valid acceptances and there is a default, then I, as escrowee under this irrevocable offer, become the vehicle by which the good faith deposit made in this offer becomes forfeited to the creditors of the estate.

MR. GREENBURG: Let me ask you this: You are holding now deeds to certain land in the State of Hawaii?

MR. HERZOG: I am holding one deed to a condominium in the State of Hawaii

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MR. TECKLIN: Who was the note made out to, if I may ask?

MR. HERZOG: I believe the note was made out to me. I have the original here.

(Off the record discussion held.)

MR. TECKLIN: I take it that will be part of your case?

MR. HERZOG: Yes.

MR. TECKLIN: All right, it is not necessary at this time.

MR. HERZOG: I just want to refresh my memory.

MR. VOGEL: While Mr. Herzog is looking, there are two documents that we would like to present to the arbitrators; one is a motion in support of the application made in our brief, and the other is our answer and counterclaim. The counterclaim is for the returning of the promissory note.

MR. TECKLIN: And the other collateral?

MR. VOGEL: Yes.

MR. TECKLIN: And you sent a letter to that effect prior to putting in

your answer?

MR. VOGEL: This proceeding, yes, and it was served also on Mr. Herzog.

MR. GREENBURG: I wondered about that statement in your brief.

When was the counterclaim served?

MR. VOGEL: The counterclaim is about to be served right now. Here is the motion on the counterclaim.

MR. TECKLIN: Is there a letter demand prior to the first date of the hearing?

MR. VOGEL: There was a demand referred to by Mr. Rackear in his opening statement last time that he had demanded it over the phone, and that we can find in the transcript if you wish.

On the Monday of the hearing, I personally served Mr. Herzog with a written demand signed by Mr. Robinson for the return of this, and, is that correct, Mr. Herzog?

MR. HERZOG: You have a copy received.

MR. VOGEL: Excuse me.

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MR. HERZOG: You have a copy received on any documents?

MR. VOGEL: No, you wouldn't give me any copy received, that is why I am asking you.

MR. HERZOG: If you show me the document, I will be glad to admit to it either way.

MR. GREENBURG: Was that before or after the hearing?

MR. VOGEL: The actual written document was the day of the hearing, after the hearing.

MR. TECKLIN: But there was an oral demand made before?

MR. VOGEL: Before the hearing and there may have been oral demands before.

But we thought that --

MR. TECKLIN: We understand.

MR. HERZOG: Yes, the promissory note is payable to me.

MR. TECKLIN: As what? As escrowee?

MR. HERZOG: "I, Frank Robinson,

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November 30, 1973, [illegible]mise to pay to the order of Robert Herzog, pursuant to offer made by the undersigned maker, the sum of $50,000, without interest.

"This promissory note is subject to all the terms and conditions of a certain offer made by the undersigned dated August 27, 1973, and is collateralized by the instrument set forth therein."

MR. GREENBURG: Let me just ask you a question, Mr. Herzog.

Why did you institute this proceeding at all? Why didn't you just make a demand under your note and if there was a failure to honor the demand, proceed in accordance with Hawaiian law to foreclose, or whatever?

MR. HERZOG: Well, there were two reasons. One was, as the case evolved, that in my discussions with Mr. Plotkin, was the problem that I was assured the money would be forthcoming after the notification of the acceptance and that the problem with Mr. Robinson was a temporary cash in liquidity,

and he was trying to get some $56,000 of funds from a pension and trust of some sort, which would make the deposit, the $50,000 deposit good, and that the balance of the funds necessary to consummate the offer would ultimately arise out of what Mr. Plotkin hoped would be a disposal of certain of these Hawaiian properties, and that was what was holding it up. The IRS problems of clearing a pension and trust fund and so forth.

So when I made my demand for arbitration, one of the reasons was the hope that Mr. Robinson's temporary financial embarrassment would be cured and the deposit made and the offer consummated.

The second reason, and that was reason one, the second reason was that as an escrowee stakeholder and attorney-at-law, I wanted to be certain that if I invoked the forfeiture provisions here there would be no claim against me for violation of any agreement.

And so I was being ultraconservative by proceeding in this manner.

And that was the reason for the insertion of the arbitration clause as far as I was concerned, since I was the proponent of that clause in the overall offer.

(Off the record discussion held.)

MR. HERZOG: I have one other remark, too.

You will note that the recital paragraph of the offer recites the fact that no one controverts that myself or Mr. Jurist, myself, as counsel to the committee, which is not in the committee, and Mr. Jurist, who is chairman of the creditors group, are named as trustees, and that goes back to the original Moratorium Agreement when Mr. Jurist and I hold certain collateral of Mr. Robinson's corporation.

Those documents will be offered in evidence, too.

So, that was the answer to your question.

MR. TECKLIN: All right, gentlemen, I think we have some rulings on your answers and counterclaim, Mr. Vogel, and

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your motion, if we may proceed with that.

MR. VOGEL: Before you get to that.

MR. TECKLIN: Yes.

MR. VOGEL: One of you gentlemen asked whether it was served. The answer is yes. Mr. Herzog wanted to see it before he admitted it was served.

MR. TECKLIN: That is the demand for the return of the collateral?

MR. VOGEL: Yes.

I show you a copy of it, Mr. Herzog. Is that a copy of which the original was served upon you?

MR. HERZOG: Yes, certainly.

MR. TECKLIN: Now, gentlemen, we are going to admit the answer and counterclaim at this time. And, do you have the original of this? We ought to file the original with the AAA. Or we can make this the original.

MR. VOGEL: It is so hard to tell which is the original.

MR. TECKLIN: You can tell by

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the paper, if anything else.

MR. VOGEL: Maybe I have given it to Mr. Herzog.

MR. TECKLIN: Do you have any copies of the answer and counterclaim? I have two here. I think that is enough. All right.

MR. VOGEL: May we reclaim one of these? We only made this one for the arbitrators.

MR. TECKLIN: We will mark this 7-A.

Do you have other copies of this?

MR. VOGEL: We have an unsigned copy.

MR. TECKLIN: The answer and counterclaim will be marked 7.

(Answer and counterclaim were received and marked as Respondent's Exhibit 7 in evidence, as of this date.)

MR. TECKLIN: And the letter dated July 14 --

MR. GREENBURG: We understand it was delivered to you the next day.

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MR. TECKLIN: But there was an oral demand made before; is that correct?

MR. HERZOG: Yes. Mr. Rackear called me on Saturday it was, and in the course of that conversation requesting an adjournment because of Mr. Rothman's incapacity, demanded orally a return of these instruments and I said that this is in arbitration; we will await the arbitrators' decision.

MR. TECKLIN: All right.

Mark them, please.

MR. RACKEAR: I wonder if I could ask Mr. Herzog one question?

MR. BUCKSTEIN: Gentlemen, may we wait a moment while the reporter marks the exhibit.

(Letter dated July 14, 1974, was received and Marked Respondent's Exhibit 7-A in evidence, as of this date.)

MR. VOGEL: Has the motion been marked? And if so --

MR. TECKLIN: No; we are going in order here, if we can.

MR. VOGEL: Thank you.

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MR. HERZOG: I have not had a chance, in the course of these proceedings to reply to the parties agreement completely. I was interrupted by certain questions, and my last remark, which I will make very quickly, is that the rules of the American Arbitration Society don't require a binder or joinder of these parties to an agreement.

It just requires that there be an arbitration clause and that there be, of course, a respondent and claimant.

I am mentioned in the contract that is under dispute and in arbitration.

I am a trustee under certain other agreements between the parties.

And I believe, under the agreement, since I have the obligation to act on certain instruments, that I am entitled to the ruling before I act pursuant to the provisions of that agreement, that it is binding, and that there has been a default, and that I am clear to react.

So I feel that there is no necessity to join other parties, and that

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it is, and I am content to pursue the claim, and having an interest in the agreement, as a qua trustee, if you want to call it that. And that if the arbitrators find there is a contract, and that there has been all these resultant defaults and what have you, the necessary consequences will follow.

MR. GREENBURG: I think we understand the position of both parties and I think we want to now get into the presentation of evidence.

MR. TECKLIN: In regard to your motion, we will deny the motion with respect to any adjournment on the grounds that these parties have not been given notice of these proceedings.

With respect --

MR. VOGEL: You don't maintain that they have. You are just denying the motion.

MR. TECKLIN: We are denying your application for adjournment on those grounds as stated in your motion.

Number two, we will reserve ---

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decision, of course, on your motion to dismiss, with regard to the question of necessary parties not been given notice at this time.

We would like Mr. Herzog to proceed with his case at this time.

MR. RACKEAR: May I just ask the arbitrator what about our motion to dismiss because of the lack of 80 percent? Are you including that?

MR. TECKLIN: We are reserving decision on that also.

MR. VOGEL: Now, with respect to asking Mr. Herzog to proceed, it is our request that all testimony herein be sworn.

MR. TECKLIN: Of course.

MR. GREENBURG: Let me just, Mr. Rackear, all of a sudden something has occurred to me. You don't want us to dismiss this proceeding if we determine that less than 80 percent, be it in amount or in number, have agreed to the offer?

What you want is for us to order return of the note and the collateral?

MR. RACKEAR: That is correct.

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What we want is a finding of fact that fewer than 30 percent of the numbers have accepted. And, therefore, there is nothing to arbitrate, and a return of the note and the collateral.

MR. TECKLIN: Should you withdraw that part of the motion with regard to dismissing it without prejudice?

MR. ROTHMAN: You mean that part of the motion which is the alternative to themotion for an adjournment?

MR. GREENBURG: No, your counterclaim and your position are inconsistent.

MR. TECKLIN: The second part of your motion, "Alternately, respondent moves that these proceedings be dismissed out of prejudice because all necessary parties have not been given notice of these proceedings nor an opportunity to participate."

At this point, are you willing to withdraw that part so that this tribunal can determine whether or not a final

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determination in favor of one side or the other side should be in order?

Then we can proceed on those grounds.

MR. GREENBURG: In other words, there are two.

(Off the record discussion held.)

MR. GREENBURG: In other words, there are two possibilities here. We could dismiss and leave everyone in the same position they were in, with Mr. Herzog still holding the collateral. Or we could make a determination that the offer wasn't accepted and order Mr. Herzog to return the collateral.

Now, the first is what you seem to be asking for in your motion, and the second is what you are asking for in the counterclaim.

And I think you should determine which is what you really want.

MR. ROTHMAN: Our problem, Mr. Greenburg, and the arbitrators generally, is that if we were convinced that there were sufficient parties before this tribunal so

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that an award would then be binding, then obviously we want you to make that award and not dismiss and that is why I don't think what we are proposing here is necessarily contradictory.

Let's assume that the arbitrators were to determine that there were not the requisite number of acceptances, which certainly we would want the arbitrators to make an award under our counterclaim for return, but if in making that award it turned out that there were not proper parties, in other words, the other parties to this agreement were not before you, so that they are not bound, what good is that award?

MR. VOGEL: It is good against Mr. Herzog.

MR. TECKLIN: That's right, and that is what we are concerned with at this point.

Mr. Herzog and Mr. Robinson.

MR. HERZOG: The thrust of their argument is that there is a condition precedent to the agreement to arbitrate, as

I understand it, and if that condition precedent is not met, there is no agreement to arbitrate, and ergo, there is no jurisdiction before this panel.

And, therefore, I think if they maintain that argument, it requires a dismissal for lack of jurisdiction, just as a determination would have been fraud in the inducement of the contract, and of the arbitration contract, and the arbitrators found that there was a fraud in the inducement of the arbitration agreement, you would have to dismiss and deny that you have jurisdiction of the parties.

MR. TECKLIN: Because there was no contract in fact, that is what you are saying?

MR. HERZOG: Correct.

If the condition did not arise, you have no arbitration contract, and, therefore, the parties are dismissed from the arbitration.

Where their remedies lie thereafter, either in courts of law or

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elsewhere --

MR. GREENBURG: In other words, you are saying we cannot order you to return the note and the collateral?

MR. HERZOG: I say that it might necessarily come to the same result.

But in this manner, if the arbitrators determine there is no jurisdiction, i.e., the necessary requisite acceptances did not come into being, and, therefore, there is no agreement to arbitrate, then that would be binding as a collateral estoppel to me and I presume an application to a court that I be directed to turn this over. Because of this collateral estoppel, it would probably work the same thing.

But I am not trying to say what the court would do or what the remedy would be, but it seems to me that that is the issue here, and his motion is obviously inconsistent with his counterclaim.

(Off the record discussion held.)

MR. TECKLIN: All right.

MR. RACKEAR: I have one

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question. Only on a question of escrow, because again I would like to know what documents are in question.

Would Mr. Herzog stipulate that the promissory note is also being held under the escrow agreement?

MR. HERZOG: I am not stipulating to anything, Mr. Rackear.

MR. RACKEAR: I am just asking.

MR. HERZOG: You haven't stipulated to anything.

MR. TECKLIN: All right, gentlemen.

MR. RACKEAR: Then can we ask him whether it is?

MR. GREENBURG: We will have here his case and we have an agreement in writing which is perhaps just an offer and we can determine that.

I don't think whatever he says now is terribly relevant anyway.

MR. TECKLIN: We have your briefs, gentlemen. And Mr. Herzog, if he wishes to reply to the briefs, may have that

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opportunity to do so, but I think at this point we ought to proceed with Mr. Herzog's case.

We understand what the issues are, and I think we ought to proceed at this point.

MR. ROTHMAN: Can we dispose of the question which you posed as to the withdrawal of that portion of our motion which is alternatively as a motion to dismiss?

MR. TECKLIN: Are you willing to withdraw it at this point or not?

MR. ROTHMAN: At this point we will withdraw it without waiving it.

MR. TECKLIN: Thank you.

All right, Mr. Herzog.

MR. GREENBURG: Are you going to be a witness in your own behalf?

MR. HERZOG: Yes.

MR. RACKEAR: Can we ask that the other witness be sequestered from these proceedings? I believe that Mr. Schrager will be a witness.

MR. GREENBURG: Then all

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It is approximately seven minutes to one.

We will reconvene at 2:00 o'clock.

(Luncheon recess taken at 12:53 p.m.)

oOo

AFTERNOON SESSION

2:00 p.m.

MR. TECKLIN: On the record.

Would you read back where Mr. Herzog left off in his testimony.

(Record read.)

R O B E R T P. H E R Z O G,

recalled as a witness, having previously been duly sworn, resumed the stand, was examined and testified further as follows:

THE WITNESS: As I indicated, after the agreement that is under contention here, the offer was drafted and signed, I rushed

to make a plane and returned to New York with the documentation that is in evidence, the deeds and assignments, the offer, promissory note.

Thereafter, and between the time I returned and September 14, I drafted a letter to go to creditors together with a consent. The contents were annexed to the letter that I will introduce in evidence and the actual consents will be introduced shortly, so obviously it was a prepared form in which the creditors were requested to execute and return, if they wished to participate under the new proposition, and the actual consents that were received will be introduced.

So at this point, I would like to introduce the letter of September 14, copies of which were sent by my office to all creditors with the consent form, which is not annexed to this exhibit, and like copies of which were sent to Mr. Robinson and his counsel.

As far as the acceptance itself, that acceptance I specifically recollect having

read to Mr. Plotkin over the phone.

I don't specifically recollect whether I read the solicitation letter, if you want to call it, of September 14, to him over the phone, because and for the reason is, it wasn't important to him how I got, or on what basis I got the acceptance. The real question was whether the acceptance form itself, when executed by the creditor, was acceptable or otherwise acceptable to him.

But I may have read it over to him.

I do remember specifically hearing and consulting with Mr. Jurist on the matter, and in fact obtaining his signature on it as the chairman of the committee, as well as my own.

Because of the fact that it was an important letter, it was a revision of the prior Moritorium Agreement, and I consulted with him to make sure that the letter was not a legalistic jumbo or garble of words in that he, as a layman, an astute one, anyway, would be a sounding board as to the letter and whether it laid out the agreement

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to creditors, whether it was understandable and so forth, and so at this point I would like to introduce into evidence the letter of September 14, less the form of acceptance that did go out with it.

MR. TECKLIN: Is that the letter, a copy of which is annexed to respondent's memorandum as Exhibit A?

MR. ROTHMAN: It was so intended when we annexed it, yes.

THE WITNESS: If I see it, I can say. Yes, I believe this is it.

MR. TECKLIN: Without the consent?

THE WITNESS: Again also yes.

I didn't check it, but I assume counsel --

MR. TECKLIN: Any objection, gentlemen?

MR. RACKEAR: No objection.

MR. TECKLIN: All right. This will be Claimant's Exhibit M.

(Letter dated September 14, was received and marked as Claimant's Exhibit M in evidence, as of this date.)

MR. GREENBURG: Do you have any

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copies for us?

THE WITNESS: No; you have it attached, but I will reproduce it if necessary.

This letter which was sent out was not meant to be anything more than an advice to creditors and a synopsis of the offer that Mr. Robinson made and an endeavor to solicit their cooperation to making that offer become effective.

MR. VOGEL: Could you read that back. I didn't hear that last thing.

(Record read.)

MR. VOGEL: Thank you.

THE WITNESS: I have in my hand a spread sheet, which was furnished to me by Mr. Plotkin, and I assume from the entries that were made thereon that the spread sheet was furnished to Mr. Plotkin in turn by Mr. Robinson or his staff.

This spread sheet was the, call it informal office log on which I noted the acceptances of creditors or my girls did, or whoever was handling it when it came back,

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A Well, if you state it is a copy of what I just saw, I will take your word for it. It appears to be a copy of a copy.

Q I don't know which one is a copy of a document. I want to be sure --

MR. GREENBURG: Let's not be overly hairsplitting on this.

THE WITNESS: It appears to be a copy of my log book.

MR. ROTHMAN: I would like to offer that as Respondent's 12.

MR. TECKLIN: Any objection?

THE WITNESS: No objection.

(Document being the log book of Mr. Herzog, consisting of seven pages, a Xerox thereof, was received and marked as Respondent's Exhibit 12 in evidence, as of this date.)

BY MR. ROTHMAN:

Q If I understood your testimony during your recitation of facts, I thought I understood you to say that you read by telephone, or you thought you read by telephone, the consent document, and you perhaps read, by telephone, to Mr. Plotkin

your letter to creditors.

A. I stated that I had read the consent document over the phone to Mr. Plotkin and I was unsure as to whether I had read the solicitation letter that went with it to him, that is my testimony.

Q. Did you, prior to distributing the letter to creditors and consent form, which is now your Exhibit --

MR. TECKLIN: The September 14 letter?

MR. ROTHMAN: Yes.

MR. TECKLIN: That is Exhibit M.

Q. Exhibit M.

Did you submit that for prior approval to Mr. Robinson or to Mr. Plotkin?

A. No.

Q. Before distributing it?

A. No.

Q. Did you submit the acceptance form to Mr. Robinson or to Mr. Plotkin for approval before you sent it out?

A. I testified I read it to him over the phone and had his verbal approval as to its form and content.

In any event, Mr. Robinson and Mr.

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Plotkin received copies of that September 14 letter together with the acceptance and consent and never raised any question as to the contents or of the material contained therein.

Q. Do you know when they received copies?

A. Itwas received and sent to them at or about the same time it went to general creditors.

Q. Did you send that?

A. My girl sent it. They are on the list of general creditors. Everything that went to creditors went to Robinson. That is the general practice.

MR. ROTHMAN: Excuse me one moment.

(Off the record discussion held.)

BY MR. ROTHMAN:

Q. Can you pin down the date of your telephone conversation with Mr. Plotkin?

A. No, I would have to refer to my bills. My best recollection is it is shortly before those letters went out, because I had prepared all the material. I was anxious to put it into the mail and I do have an independent recollection of having some trouble reaching him and the mail was ready to go out and then I finally got hold of him. I didn't

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want to send it out without his approving the consent of the acceptance. That was the key as far as I was concerned.

Q. You didn't consider it was important as to what the offer said, your explanation of the offer?

A. You mean my, the dealings I had with the people I represent?

Q. Yes.

A. No, I didn't think it was important.

Q. As a lawyer, Mr. Herzog --

A. Mr. Jurist was the chairman. It was his letter. I was strictly acting as counsel to the committee and as secretary. I was the one that typed the letter and sent it out. Mr. Jurist approved its content.

Q. Is it clear then from your testimony, and I want to be certain of this fact, that you did not distribute to the creditors copies of the offer of August 27, 1973?

A. Correct.

Q. What you sent to creditors was a summary of that document under the date September 14, 1973?

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A. Correct.

(Off the record discussion held.)

MR. TECKLIN: Mr. Herzog, is that the customary practice sending out a resume of a letter indicating what the terms are and the consents attached to it, generally?

THE WITNESS: Generally it depends on the form that the common law agreement takes.

As you will notice from what went on before, the Moratorium Agreement was sent to all creditors, because creditors were asked to join in the provisions of a completion agreement.

The offer was not sent because it was merely an offer. It wasn't a contract. It didn't become binding until the sufficient requisite number agreed.

And, therefore, it was deemed only appropriate that a summary of what was made was being offered in dollars and cents be sent out.

MR. TECKLIN: And that the acceptances would be in the form of consents; is that

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correct?

THE WITNESS: Exactly. Acceptances and consents.

MR. GREENBURG: Did any of the creditors ask you to see an underlying document?

THE WITNESS: Not a single one.

MR. TECKLIN: You may proceed, Mr. Rothman.

BY MR. ROTHMAN:

Q. Mr. Herzog, have you looked further through your file to find whether you can locate any earlier drafts of the August 27 document?

A. Oh, I may have one, I don't know. If you show me one, I will tell you whether it was an earlier draft.

I indicated how it arose. I am sure that Plotkin had some earlier drafts.

Q. I am going to show you a document appearing on the stationery of Plotkin & Saltzburg, consisting of four pages, which bears the heading, "Agreement," and ask you to look at that.

A. Yes, this seems to be a draft. My handwriting appears on the bottom of the first page.

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creditors accepting. If it is not in this offer, that collateral would have been returned to him.

Q. Was it my understanding then that your concept at the time this offer was being signed by Mr. Robinson, that he was putting up his personal assets and the corporation was going to issue notes to those creditors who opted for the --

A. No.

Q. For five percent?

A. Not at all.

Q. Plus additional payment?

A. No.

Q. What are you telling me?

A. The offer set forth, Offer 2 says that the presently existing creditors of Frank Robinson Advertising, Inc. are hereby offered a five percent cash payment and a 20 percent deferred payment, without interest, payable in five installments, of four percent each, evidenced by a series of promissory notes, with an acceleration provision commencing March 30, 1974, and each and every three months thereafter until paid in full satisfaction, remise, release and discharge thereof. And that these notes would be Robinson's, since he

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is the offeror.

Q. The notes would be Robinson's notes?

A. That is correct.

Q. I see.

Let me refer you, sir, to your letter of September 14, and in particular to the paragraph at the top of the second page, and refer you to the language evidenced by a series of promissory notes of the debtor, with acceleration provisions, et cetera.

A. It is incorrect.

Q. Are you now substituting Mr. Robinson for the debtor?

A. No, the letter is incorrect.

Q. The letter is incorrect.

MR. ROTHMAN: I move to dismiss the proceeding.

MR. GREENBURG: Continue with your case, Mr. Rothman, please.

THE WITNESS: The debtor there can confer, depending on how you construe it to the offeror, would become the debtor for the offer is accepted or it can be construed to Frank Robinson Advertising, Inc.

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If it is construed to referring to the corporation, it is an incorrect construction. It is as simple as that.

BY MR. ROTHMAN:

Q It is now your view, is it, that Mr. Robinson was going to put up his own money to pay these creditors, including the deferred payments, and he was not to receive back the collateral? You held the stock in Frank Robinson, and you were going to be in a secured position in addition?

A I refer you to the agreement, Mr. Rothman. I think the agreement speaks for what Mr. Robinson offered.

It says Mr. Robinson makes the offer personally. And I think that agreement speaks for itself as to who was making the offer.

I believe the offer also contains some language somewhere that it will be in substitution of, if it becomes effective, of the prior moratorium, and I think the legal significance of that speaks for itself.

MR. GREENBURG: I don't think that was his question.

The answer was not responsive to the

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question.

Correct me if I am wrong, Mr. Rothman, but wasn't the question as to what would happen to the collateral upon the initial payment, the acceptance and initial payment called for either in Offer 1, which is only a single payment or in Offer 2, at the time that notes were given in Offer No. 2?

MR. ROTHMAN: That is a good way of putting it.

THE WITNESS: The disclaimer speaks for that. I refer you to page 4. It says the offeror acknowledges there is an existing Moratorium Agreement. The offer is not intended to alter or modify it unless, or until and unless this offer, the said offer, is accepted by the requisite amount of creditors.

MR. GREENBURG: You are still not answering his question.

His question is, by reference to the agreement or your understanding, based on the conversation, what was to happen to the collateral you were holding.

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THE WITNESS: It would be given back to him.

MR. GREENBURG: At the point in time where the offer was accepted?

THE WITNESS: That is correct.

MR. GREENBURG: And the initial payment was made?

THE WITNESS: Once we had an acceptable substitute for the Moratorium Agreement by this offer being accepted by the requisite number of creditors.

MR. GREENBURG: At that time you would return the collateral?

THE WITNESS: Yes, because the Moratorium Agreement would have been waived to the extent of 80 percent.

MR. TECKLIN: After the deposit was made?

THE WITNESS: Yes.

MR. TECKLIN: And the deposit was never made; is that correct?

THE WITNESS: Correct.

MR. TECKLIN: I think that should answer the question.

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A Quite possibly so. But that is an ambiguity of the agreement as you so point out.

But I think the significance of having the new offer, having been accepted and the consideration posted, had Mr. Robinson been able to do that, would have obviated that, because the collateral would have been returned to him with a cancellation of the UCC filing.

MR. GREENBURG: Off the record for a minute.

(Off the record discussion held.)

MR. TECKLIN: Back on the record.

BY MR. ROTHMAN:

Q Unless I missed it, Mr. Herzog, you didn't inform the creditors in your letter of September 14th that there was going to be the return of any collateral, did you?

A The letter speaks for itself. I don't think you need my testimony on it.

Q Did you intend to? Was that a mistake?

A The letter is what I sent creditors with Mr. Jurist, or what Mr. Jurist sent through me. It was a combination of our joint effort.

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Q I want to know if that was a record. You have now told us that this letter doesn't speak for itself.

A I tried to be informative as I can in letter, but also if I start sending out a letter that runs 18 and 19 pages, sometimes it obscures what I am trying to achieve.

Q All right.

A The letter was, hopefully, as informative as possible and as brief as possible.

MR. TECKLIN: And you saw no need to notify the creditors about this particular stock in Plastimaid?

THE WITNESS: Whatever was put in there. I think I just said it was collateralized. I might have just instead of being specific been very general. I don't have that in front of me. But I think I mentioned something about the promissory note being --

MR. TECKLIN: It is attached to the respondent's memorandum.

THE WITNESS: Yes.

I believe I said something about a

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collateralized note and Mr. Jurist deemed that to be sufficient.

MR. VOGEL: But that has nothing to do with Plastimaid.

BY MR. ROTHMAN:

Q. A collaterized note in your letter to creditors?

MR. BUCKSTEIN: He talks about a deposit of the equivalent of $50,000.

MR. ROTHMAN: I think we are talking about two different things.

So we can be sure we are on the same level, the $50,000 note is the one that has security of the lease and the deed.

MR. BUCKSTEIN: Yes.

MR. ROTHMAN: I think Mr. Herzog is referring to a collateralized note, of a promissory note in Offer No. 2.

BY MR. ROTHMAN:

Q. Isn't that what you --

A. I am confused. I don't know what you are referring to. I don't have the letter of the 11th in front of me.

MR. ROTHMAN: Which paragraph are you

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referring to?

Q Let me read from the letter of September 14, page 2, at the top, "Alternative Offer No. 2.

"Creditors are offered five percent in cash and a deferred payment of 20 percent, payable four percent every three months, commencing March 1974, which is to be evidenced by a series of promissory notes of the debtor with acceleration provisions in the event of default in full and final payment of their original receivable as at the date of the prior Moratorium Agreement (October 1972) payable upon acceptance by the requisite amount of creditors."

Was it your intention that the notes of the debtor were to be collatoralized?

A No, the notes of Mr. Robinson.

Q Which notes of Mr. Robinson?

A Are you referring to page 2?

Q Yes, page 2. I just read the entire paragraph entitled, "Alternative Offer No. 2."

A Where does it say collateralized?

Q It does not.

A So why did you say that?

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I think the alternative offer speaks for itself. It says what it is.

You are referring to the word "debtor" and I say you construe debtor as offeror if you want.

MR. TECKLIN: I think the question was whether or not in your letter there were any notes, either to the debtor or the offeror, which was to be collateralized.

THE WITNESS: I think the letter --

MR. TECKLIN: Is that your question?

MR. ROTHMAN: That is in a sense.

THE WITNESS: No.

MR. TECKLIN: The answer is no.

Let's proceed.

BY MR. ROTHMAN:

Q What I have been trying to find out, whether it was your understanding of this transaction at the time the offer was signed by Mr. Robinson that the notes representing the deferred payments under Alternative No. 2 were supposed to be collateralized notes.

A. That was discussed and it got washed out in the agreement which ultimately came out as

an offer.

There were a lot of things. I wanted Mr. Robinson's wife pledged here, if I could get it. Obviously, I wanted a lot of things. And obviously Mr. Robinson refused to give me a lot of things.

And as a result of four days of negotiations, it evolved to the written agreement which is in controversy here. It is as simple as that.

There was a discussion of collateralizing collateral, the old collateral.

But it got lost in the shuffle.

Q. Well, you say it got lost---

MR. BUCKSTEIN: I don't understand that offer.

THE WITNESS: I rely on the agreement, which it was not.

MR. BUCKSTEIN: It was not intended to be collateralized?

THE WITNESS: Yes. I asked for it and I can't get it.

MR. BUCKSTEIN: I understand the answer now.

MR. GREENBURG: Off the record now.

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(Off the record discussion held.)

MR. TECKLIN: Back on the record.

BY MR. ROTHMAN:

Q. What was your understanding on August 27, 1973 that if you received the cash to fund the Offer 1 or Offer 2 that required cash payments, those portions there, Offer 1 requiring all cash, Offer 2 requiring five percent cash, if you received that cash, and promissory notes of the debtor representing the 20 percent balance of those who would accept Offer No. 2, what was to happen to Mr. Robinson's $50,000 note and collateral that was delivered to you on August 27?

A. Who are you referring to when you say "debtor"?

Q. Who are you referring to when you say "debtor"?

The debtor is Frank Robinson Advertising, Inc. That is the debtor in this proceeding.

A. I believe it is the offeror because the letter says, "substitute offer summarized," on the bottom, and it refers to what the committee obtained, which was a substitute offer from Mr.

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Robinson as an individual, and obviously the word "debtor" here should be construed as offeror to give it the proper meaning.

And my understanding is it was from the offeror.

And I don't see what this letter, which is an inartistic attempt apparently to communicate something to creditors has to do with the agreement which is in writing, and which is the contract that is under dispute. Not the letter I sent creditors.

MR. GREENBURG: Let me make a statement.

MR. ROTHMAN: I will ask that that be stricken as totally unresponsive.

MR. GREENBURG: I want the record to note that I am thoroughly dissatisfied with the cross-examination and the evidence.

To begin with, Mr. Rothman, that question was asked and answered a good while ago.

Second of all, Mr. Herzog, you are arguing, you are not answering the questions. You are being evasive and not responsive.

The question was what was to happen to the $50,000 note, and to the assignment of the lease and the deed if the cash deposits and the promissory notes were made.

He asked you that before.

THE WITNESS: May I answer?

MR. GREENBURG: You had no business in answering it again.

And the witness, all you had to say is they are to be returned, which I understand is your prior testimony.

THE WITNESS: Correct.

MR. GREENBURG: If we are going to conclude these proceedings in a reasonable period of time, I think the cross-examination should be precise, directed to specific points; it shouldn't ramble. We shouldn't have the same question asked over and over again.

And Mr. Herzog no matter how offended you are by the conduct of Mr. Robinson, hopefully answer yes or no, and save the speeches for your closing argument and maybe we can get this thing done in a reasonable

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time.

MR. ROTHMAN: May I just briefly make a statement, that had I heard that or gotten the answer that it was to be returned, I would not have asked the question again.

MR. BUCKSTEIN: Okay, let's proceed.

MR. ROTHMAN: It was probably tucked in the middle of a speech and I lost it.

MR. BUCKSTEIN: Let's proceed.

BY MR. ROTHMAN:

Q. What, to your mind, Mr. Herzog, then is the meaning of the words in the offer document, under the paragraph, "Deposit and Offer"?

A. Are you referring to what document?

Q. The "Offer" document.

A. I believe that the offer speaks for itself. I don't know that it has any ambiguity, to my mind.

Q. I haven't even asked you the question.

MR. GREENBURG: Let me also indicate that since you are in a dual capacity, Mr. Herzog, if you want to object to a question, indicate your objection again rather than arguing with the question.

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lawsuits for nonconsenting creditors, and pressure from consenting creditors at the present time?

A. I don't have any recollection of that, but that was or might have been discussed.

Q. Did you, in the course of your visit here, go out to the plant or the place of business of Frank Robinson Advertising?

A. Yes.

Q. Did you look at the premises and the inventory?

A. Yes.

Q. Did you discuss the finances and the current problems of this concern?

A. I don't have an independent recollection of that, but it must have been.

Q. Did you not reach conclusions while you were there that a liquidation of his business would not result in any benefit of creditors?

A. My legal conclusions were conveyed to the chairman of the creditors committee. And they are privileged between me and him.

Q. Again let's look at your letter of September 14th.

Paragraph 3 of page 1 reads:

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"Examination of the present condition of the debtor indicated that liquidation of the debtor and its affiliates at this time would not have produced any significant additional moneys for creditors because of prior secured bank loans."

Now, my question is, is that an opinion that you reached at the time you were discussing this, this transaction with Robinson and Plotkin?

A. It is both the opinion of Mr. Jurist, who signed it, and my opinion, because I signed it also.

Q. Was it your opinion on August 27th?

A. It was my opinion when I wrote the letter and it was my opinion on August 27th.

Q. Didn't you in fact so indicate to Mr. Plotkin and Mr. --

A. I don't recall.

MR. TECKLIN: Would you let him finish the question, please.

Q. Isn't it true that you indicated to Mr. Plotkin and to Mr. Robinson that you could see that there was nothing the creditors could get out of this deal except by way of something that

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Robinson would put into it?

A I will start.

I object. What is the relevancy of this?

MR. TECKLIN: This is cross-examination.

MR. GREENBURG: Let's go off the record.

(Off the record discussion held.)

MR. TECKLIN: Back on the record.

MR. BUCKSTEIN: The last item on the record was a question that was objected to.

Would you tell us the relevancy of the question, please.

MR. ROTHMAN: Can I hear the wording of the question, please.

(Record read.)

MR. ROTHMAN: It has to do with the matter of forfeiture.

MR. BUCKSTEIN: With what?

MR. ROTHMAN: For forfeiture and damage and release.

It goes to the heart of the whole matter as to what was the consideration

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involved, what was going to happen.

MR. BUCKSTEIN: Well, subject to connection, I think we will take the question and we will wait for an answer, but I don't immediately see the relevance of the question.

Perhaps this line of questioning will disclose it. I haven't seen it.

Would you answer the question, Mr. Herzog, please?

THE WITNESS: Again I forgot the question.

Would you read it once more, please.

(Question read.)

A. First I --

MR. BUCKSTEIN: That can be answered yes or no, Mr. Herzog.

A. It is not because I didn't indicate anything. They knew the finances.

MR. BUCKSTEIN: Fine.

Q. What was your concept at August 27, 1973 of what would happen to the $50,000 note and security in the event that there was acceptance and a failure to provide the cash and promissory

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If Mr. Plotkin wanted the originals, they could be procured by writing the creditor.

Q. Did you see the envelope in which they were received?

A. I didn't open it. I don't cut the envelopes open in my office.

Q. Do you know if it was an eight and a half by eleven or a --

A. I don't know how it came.

Q. (continuing) -- or a three by eight envelope?

A. I have no knowledge of how the, it came in.

Q. Did you supervise the mailing of September 14, 1973, Mr. Herzog?

A. I don't know what you mean by supervise.

MR. TECKLIN: You mean the letter?

Q. The letter and the --

A. Of which letter?

Q. The letter and the attachment.

MR. TECKLIN: Letter to the creditors.

A. The letter of September 14th?

Q. Yes.

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A. In a generic sense, I prepared it, I told them how many copies to Xerox, told them what to do with it, put it in a machine and send it out.

Q. Did you examine a sample mailing before it went out?

A. What do you mean? Did I check the envelopes to see if they were addressed properly?

Q. Did you check to see what was in a sample envelope?

A. Mr. Vogel, I gave my secretaries the originals of what I wanted sent to each creditor. I gave them the addresses that we had. There are mailing labels that were made up from preceding times. I have the mailing labels here. I told them to put them all in an envelope, weigh it, put the postage on it, send it out.

Here are the mailing labels that had been used and were used whenever there are duplicates so you can have three or four mailings. They are Dennison snap sheets.

When a letter came back with a improper mailing, they would scratch that one and correct the address list.

Q. Now would you answer the question?

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A. I assumed it to the extent I just answered.

Q. Now would you answer the question, did you look at one one envelope to see what was in it?

THE WITNESS: I object to the materiality and relevancy of this.

MR. TECKLIN: We will sustain the objection.

MR. VOGEL: All right.

BY MR. VOGEL:

Q. Could you tell me whether or not the acceptance was stapled to your letter of September 14, 1973?

A. I don't know whether it was stapled or whether it was not.

My staff did it. I told them what to package in it.

MR. VOGEL: Referring to Respondent's Exhibit O-1, which is the only acceptance which purports to be an original, I invite the arbitrators to the fact that there are no staple holes in this acceptance.

MR. TECKLIN: So noted, Mr. Vogel.

MR. VOGEL: All right.

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Gentlemen, it is 5:00 o'clock.

MR. GREENBURG: Do you have any more questions on the pool?

MR. TECKLIN: Yes, on the pool thing.

MR. VOGEL: None.

MR. TECKLIN: So we can end at that int?

MR. VOGEL: None that I can think of. We may think of something else, but I have no questions on it.

MR. TECKLIN: All right, the hearing is adjourned until tomorrow at 10:00 o'clock.

(Time noted: 5:00 p.m.)

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MR. TECKLIN: Not on the moratorium agreement. The parties are not here. The corporations are involved.

All we have is Mr. Herzog and Mr. Robinson at this proceeding. It does not involve any others. We are not going to join any other parties to this proceeding who have not been joined at this point.

That is not our authority. We have no jurisdiction to do so.

If you have another proceeding between different parties or related parties then you will have to seek your remedy either in a court of law or in another arbitration proceeding.

We are not faced with that problem here.

MR. ROTHMAN I think if you look at the memorandum on joinder which has been submitted, I think you find you do have that obligation under the rules of procedure under New York, that you can adjourn this proceeding until you bring all the proper parties before it or you can dismiss it

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without prejudice so that the proper parties can -- we shouldn't be involved in relitigating this matter time after time.

MR. GREENBURG: But we not going to do that for the purpose of adjudicating when the moratorium agreement is still operative or has any effect, because there is no controversy concerning that.

Mr. Herzog nor has any creditor brought an action to seek any relief under the moratorium agreement.

We have no idea whether anyone will ever do that, and there is no reason for us to adjudicate what/us is at this point only a hypothetical problem.

MR. RACKEAR: The document in question is this offer.

This offer contains language dealing with a modification, change or other alteration of the moratorium agreement.

Does it not?

MR. GREENBURG: There is language to that effect, yes.

MR. RACKEAR: Okay. Then if that be

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the case, one of the issues in the proceeding is whether or not that moratorium agreement has been terminated.

MR. GREENBURG: No.

MR. BUCKSTEIN: That is not an issue in this proceeding. We have not been asked to interpret that provision, assuming this is an agreement, that provision of this agreement.

MR. ROTHMAN: How can you only decide part of it.

MR. RACKEAR: Are you letting the claimant decide what the issues in this case are? Just the claimant?

MR. BUCKSTEIN: The only questions we have been asked to adjudicate as I understand these proceedings is whether there was an offer and valid acceptance resulting in a contract and whether that contract was breached.

I don't understand or know of any other questions.

MR. GREENBURG: So that the forfeiture provision can be exercised by the escrow

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agent, and you have asked for in respect of a return of the collateral to Mr. Robinson.

No one has submitted to us any question concerning the language of the offer pertaining to the moratorium agreement or any question under that moratorium agreement. And I don't think anyone can present that question because there is no dispute.

MR. BUCKSTEIN: What is the relief you seek in your counter-claim?

MR. RACKEAR: The return of the escrow documents.

MR. BUCKSTEIN: Which escrow document?

MR. RACKEAR: All of the escrow documents.

MR. BUCKSTEIN: Under which escrow?

MR. GREENBURG: The note, the stock, is that correct?

MR. BUCKSTEIN: No, one moment.

MR. RACKEAR: It depends upon the adjudication.

MR. BUCKSTEIN: Have you asked for a return of the stock certificates and assignments in your counter-claim?

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MR. ROTHMAN: No.

MR. RACKEAR: Right. But on the other hand, if there is an adjudication here that this was a valid offer, a valid acceptance and a contract, therefore, arose, it is our contention that the moratorium by the terms of the document in question terminated. If that be the case, then all escrow documents under the moratorium must be returned to us.

THE WITNESS: That agreement was made between the corporation and myself, and Mr. Robinson has no right to demand it to be returned to him personally.

MR. ROTHMAN: It is his stock.

THE WITNESS: That may be so, but it is under an agreement with the corporation.

MR. TECKLIN: It is here.

MR. RACKEAR: The agreement was also with Mr. Robinson as a pledgee.

MR. BUCKSTEIN: The relief demanded in the counter-claim does not refer either directly or indirectly to the stock certificates and powers attached.

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MR. ROTHMAN: That's correct, Mr. Buckstein. It doesn't because at the time we framed that we had no concept that Mr. Herzog was going to sit here and say that he was entitled to proceed under the moratorium agreement, if this was an accepted offer.

THE WITNESS: Just a moment, I take issue with that for this reason, because I told Mr. Rackear and I told Mr. Vogel, particularly when he was in my office examining these consents, that I didn't understand the nature of his actions in the proceeding, that I considered the moratorium agreement as valid, if this instrument was not valid the moratorium agreement was valid and I intended to proceed in the future with all remedies thereunder.

He was fully advised in my office of my concept that the moratorium agreement survived.

(Off the record discussion held.)

MR. ROTHMAN: I think then it would

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then be appropriate for us to move to amend the counter-claim with an alternative prayer, that in the event there is an adjudication of an accepted offer, that the relief include the return of the security documents and the collateral and pledge under the moratorium agreement.

MR. GREENBURG: In order to do that, don't you have the obligation of joining additional parties?

In other words, wouldn't an order of the panel requiring Mr. Herzog to return the stock certificates affect the rights of the creditors? And in order for us to adjudicate that on an amended counter-claim filed by you, don't you have the obligation of bringing those creditors before the panel?

MR. ROTHIAN: You may be right. And, again, that is why we raised the question of parties in joinder here in the first instance because we don't think this has been a properly brought-out and constituted proceeding.

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It is just an idea to come in here and grab $50,000. That is all the man is trying to do.

And we are going to be faced with all kinds of problems in future litigation.

THE WITNESS: I don't believe the arbitration rules worry about or concern themselves with the multiplicity of actions.

We are not operating under a multi-district litigation rule in effect in the arbitration rules.

Secondly, the moratorium agreement has its own, independently covenanted for and agreed arbitration provision. It is a separate contract.

It stands on its own rights and remedies as the writing of the parties agreed to.

Mr. Rackear and Mr. Rothman could have demanded arbitration under that agreement here or in Los Angeles or Mr. Plotkin could have when they got my original notice, and if they were concerned with multiplicity of actions or the rights under that agreement or the question of novation that has

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been recently raised here, they had their remedy.

It didn't appear to concern them at that time, the attorneys that were advising them. And they have that remedy even after, if their relief is denied even afterwards.

MR. ROTHMAN: What Mr. Plotkin did or didn't do I am unfortunately not in a position to read his mind. And he has not seen fit to discuss his theories or his thoughts or his lack of thoughts or his inaction.

I doubt that the failure to have applied for a stay of proceedings oust this panel from the right and jurisdiction to make a determination of a dispute before them as to the proper parties and if the proper parties aren't before them not to make a determination of the dispute.

You chose the forum, you chose the means by which you were doing this. It was not our doing.

THE WITNESS: I didn't choose it. It was agreed upon.

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MR. GREENBURG: Let me ask a question. Have you thought, Mr. Herzog, about whether or not you will in any sense seek to enforce the moratorium agreement subsequent to this proceeding?

THE WITNESS: I feel it is a separate agreement and that I may, the creditors, to the agreement, may have rights thereunder, and I am not in a position, I haven't thought it out fully, except I believe they have rights and I believe they should be preserved to the extent that it is a viable agreement.

I believe the issue of whether the moratorium is a viable agreement, based upon this very -- this defense of novation, is a separate, distinct issue, when the enforcement of that agreement, if it ever comes, comes to pass.

MR. GREENBURG: Does anyone else want to say anything?

MR. RACKEAR: Could you just give us one moment.

(Off the record discussion held.)

MR. TECKLIN: Back on the record.

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MR. RACKEAR: Can I continue?

MR. GREENBURG: Go ahead.

MR. RACKEAR: In the letter of September 14, 1973, which appears on the stationery of Mr. Herzog, I want to read, which is his summary, I want to read one paragraph, which is entitled, "Substitute Offer Summarized".

"As a result of the intensive negotiations mentioned above, the committee was successful in obtaining a substitute offer for Mr. Frank Robinson as an individual, which if accepted by creditors will replace the prior moratorium agreement of October, 1972. The substitute offer, one or the other of which must be chosen is as follows:"

Now, if that isn't clear indication that it was his theory at that time, that this offer, if accepted, would replace the moratorium, I will eat it.

MR. GREENBURG: All right. Mr. Herzog, would you at this time make a stipulation on the record concerning this proceeding and the question of personal liability of Mr.

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Robinson and whether you intend to seek any remedy from Mr. Robinson personally beyond this proceeding under the offer?

THE WITNESS: Again, my intention is not to proceed personally against Mr. Robinson, except as his liability appears in this offer.

MR. GREENBURG: Beyond your intention you so stipulate?

THE WITNESS: Yes.

MR. GREENBURG: Could we have another recess, please.

MR. ROTHMAN: Let the record show that that would not be an acceptable stipulation as far as we are concerned.

(Recess taken.)

MR. TECKLIN: Back on the record.

MR. BUCKSTEIN: The Arbitrators have considered the questions raised prior to the recess.

The motion to amend the counter-claim to secure the return of the security deposited pursuant to the moratorium agreement is denied without prejudice to respondent's right to.

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seek such relief as he may deem appropriate in other proceedings.

It is our understanding that the claimant is barred from seeking any additional recovery from respondent based upon the alleged agreement which is the subject of this proceeding, to wit the offer dated August 27, 1973 beyond the recovery sought in this proceeding.

I would like to proceed with respondent's case.

MR. GREENBURG: Excuse me, was there any other cross examination?

MR. BACKEAR: I guess not.

Can we just have one moment to consult?

MR. BUCKSTEIN: Certainly.

(Off the record discussion held.)

MR. BUCKSTEIN: Would you like that read back, Mr. Rothman?

MR. ROTHMAN: I think I understood it. The question we have is that ruling also applies to the problem of the survival, so to speak, of the moratorium agreement, in the event that the Arbitrators were to

determine that there was acceptance of the offer.

MR. BUCKSTEIN: We are not ruling on the moratorium agreement. We don't consider that a question properly before us.

MR. ROTHMAN: Well, we would like it to be before you, because we think that an adjudication cannot be made --

MR. GREENBURG: We already issued a ruling and there is no need to discuss it further.

MR. BUCKSTEIN: I would just say, if I may add one last thought, which we had discussed.

We believe that respondent, if it had been interested in adjudication, with respect to the moratorium agreement could have either joined the necessary parties in the proceeding or instituted a separate arbitration in order to consolidate the two in order that the arbitration might have adjudicated the moratorium agreement at the same time.

MR. GREENBURG: And having failed to do

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so, and having moved by your motion, we have ruled on the motion and denied it.

MR. RACKEAR: We would like the record to indicate that we take exception to that.

MR. ROTHMAN: All right.

MR. BUCKSTEIN: The record so indicates.

MR. ROTHMAN: Would the Arbitrators now please consider the motion which we made earlier which was temporarily withdrawn, that these proceedings be either adjourned for the purpose of joining all of the proper and necessary parties or in the alternative that they be dismissed without prejudice.

MR. GREENBURG: As far as adjourning the proceedings, we indicated at the very beginning we wouldn't do that.

As far as your argument that the proceeding is instituted by claimant is defective because of his failure to join the necessary and proper parties, we will consider that at the time that we make a ruling.

MR. TECKLIN: We reserve decision on that.

MR. GREENBURG: That is right. We are

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not making any determination now.

MR. RACKEAR: Can I ask another question, if I may.

Is it also your understanding that we are, therefore, precluded from any testimony on the part of Mr. Robinson dealing with the understanding as to whether or not there was a survival or would be a survival of that moratorium agreement?

MR. BUCKSTEIN: We have not ruled on that question. And at such time if there is an objection made, we will rule on the objection at that time.

Is there any further cross examination of the claimant?

MR. RACKEAR: No.

MR. GREENBURG: I have a couple of questions for Mr. Herzog.

The escrow receipt, which is exhibit 15 speaks of your listing the Hawaiian properties contemporaneous with giving notice of default to Plotkin & Saltzburg.

Did you do that?

THE WITNESS: I have not listed th

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Q Now, Mr. Robinson, you are familiar with the fact that a certain letter was sent out to creditors on the stationery of Mr. Herzog which also contained a document entitled "Acceptance of Offer of Frank Robinson."

You are familiar with that document?

A Yes, I am familiar with the document.

Q Would you tell us when was the first time that you were aware of the circulation of that document?

A In the middle of September, I had two or three calls, I am not sure whether it was two or three, from various friends of mine at television stations saying that they had received the offer document from Mr. Herzog, and quite frankly they asked me which offer I would prefer that they accept, the ten percent with full release or the five percent with 20 percent payments deferred.

I asked them exactly what the letter soliciting the consents consisted of and what it said and portions of it were read to me over the telephone.

I did want to see it in its entirety,

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so I called Mr. Schrager at Blair and he subsequently sent me a copy of Mr. Herzog's letter to the TV creditors.

Q Are you testifying that you did not receive a copy of this document directly from Mr. Herzog?

A. I did not receive a copy of the document directly from Mr. Herzog.

Q Now, Mr. Robinson, you are familiar with the document which you signed, you just told us that you read it and you understood it or at least you thought you understood it.

Would you tell us what you understood to be the problem dealing with a release and what it was that you thought you would be released from under the terms of that instrument?

MR. HERZOG: I object as a conclusion from the witness.

MR. TECKLIN: You may answer.

MR. HERZOG: Would the question be reread, please.

(Question read.)

THE WITNESS: Are you talking about the personal release? You are talking about

again the parties were Mr. Herzog and Mr. Plotkin and myself.

I might say most of the discussions were between Mr. Herzog and Mr. Plotkin.

From the discussions, it was my understanding that upon a legal acceptance of the offer, the Moratorium would cease; and consequently the collateral documents, the stocks would be returned.

Q Now, Mr. Robinson, you testified just a few minutes ago that you received, upon request, a copy of the letter of September 14, 1973, which was on the stationery of Robert P. Herzog and circulated to the creditors.

A Yes.

Q When you received that letter, did you read it?

A Yes.

Q When you read the paragraph dealing with and entitled, "Substitute Offer Summarized," which I would like to show you now -- would you read it first?

A Yes. I read it.

Q When you read the words, "which, if accepted by creditors will replace the prior

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Moratorium Agreement of October 1972," did those words express the essence of the negotiations to which you just testified?

A Yes, it did.

Q Now, I would like to ask you about a portion of the paragraph in the same letter entitled, "Alternative Offer No. 2," and I would like to show you that first so that you can refresh your recollection as to its content.

A Yes.

Q When you read the words, "creditors are offered five percent in cash and a deferred payment of 20 percent payable four percent every three months commencing March, 1974 which is to be evidenced by a Xerox of promissory notes of the debtor," did that conform with your understanding of the obligations under the offer?

A I construed that to mean the debtor corporation. Because it was never the intention that there were to be any personal notes for the 20 percent deferred payment.

MR. GREENBURG: That is not an answer to his question.

The question was, was it your

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understanding that that language accorded to the agreement?

THE WITNESS: Yes.

MR. RACKEAR: I am not completely happy with the amended question and the answer.

BY MR. RACKEAR:

Q Was it your understanding, from the negotiations which took place on August 27, that the notes were to be the notes of the debtor corporation?

A Yes.

MR. HERZOG: I object again to the completely leading questions. He is not getting facts from this witness. He is getting yeses and noes to his leading questions.

MR. TECKLIN: I am not sure we h an answer to that question.

MR. GREENBURG: I think the objection is proper.

Let me ask the question.

Do you have the offer agreement before you?

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THE WITNESS: Yes.

MR. GREENBURG: If you would look at the second page, the carry-over paragraph, what was your understanding of the language evidenced by a Xerox of promissory notes, and specifically, as to whose notes were involved?

THE WITNESS: It was my understanding that the notes were to be notes of the debtor corporation, Frank Robinson Advertising, Inc.

MR. TECKLIN: When you receive a copy of this letter, was it still your understanding as to whose notes would be given as evidence of the indebtedness?

THE WITNESS: Yes, my understanding was the same.

MR. TECKLIN: The same.

BY MR. RACKEAR:

Q Mr. Robinson, in the question dealing with a sale of the assets or stock of Plastimaid, what was your understanding as to who was to sell what?

A (No response.)

Q Is the question unclear?

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A That is another corporation.

Q But it was another corporation or yours individually? Was it a joint venture?

A Yes.

Q Who was the other co-venturer?

A An Ohio corporation.

MR. BUCKSTEIN: Is that co-venturer in any way related to any of the parties that have been discussed or mentioned today?

THE WITNESS: No.

BY MR HERZOG:

Q Getting to the letter of September 14, 1973, a copy of which you received from Mr. Schrager, I think you testified that you read it and understood it and that it, in your mind, capsulized the understanding between yourself under the offer and the creditors; is that correct?

MR. RACKEAR: We object to that. That was not his testimony.

MR. GREENBURG: Sustained.

MR. TECKLIN: Yes.

Q In what way did the letter of September 14th, which you have read, contradict in any manner your understanding of the agreement?

MR. GREENBURG: Why don't you ask him in what way, if any.

MR. HERZOG: I said "if any."

MR. GREENBURG: I didn't hear that.

(Question read.)

Q In any manner or in any way.

MR. ROTHMAN: If any.

MR. HERZOG: If any.

A At the time I read the letter, I thought in substance it was the same as the offer.

MR. TECKLIN: Your understanding of the offer; is that correct?

THE WITNESS: Yes.

BY MR. HERZOG:

Q Did you --

MR. TECKLIN: Your understanding of the offer?

THE WITNESS: Yes.

MR. TECKLIN: After having read it?

THE WITNESS: Yes.

BY MR. HERZOG:

Q Did you, yourself, or did you instruct your counsel at that time to communicate orally or in writing to me objecting to the format of the

September 14th letter?

A. No, I did not.

Q. I refer you in particular to item "B", contained in that letter, called "Conditions of the Substituted Offer." I would ask you to read it to the arbitrators and into the record.

MR. GREENBURG: I don't think that is necessary.

MR. HERZOG: All right.

Q. Well, I will point out the letter provides --

MR. GREENBURG: No; that is not necessary, either.

MR. HERZOG: All right.

MR. TECKLIN: You can show it to him.

MR. GREENBURG: We can read it.

Q. Did you read item "B" as well as the other parts of the letter?

A. I read the whole letter.

Q. Isn't item "B" contradictatory of your testimony?

A. I think you asked me, Mr. Herzog, at the time I received the letter did I read it, and did I feel at the time that there was any difference

between the letter and the offer, as I understood it, and I think I testified that at the time I didn't think there was.

MR. TECKLIN: What about now, Mr. Robinson? After reading it now?

MR. ROTHMAN: The letter in whole or a particular phrase?

THE WITNESS: If we are talking about point "B", in further scrutiny of the letter, I see that point "B" says that the acceptance of the offer must be accompanied by no less than 80 percent of the amount owed.

Which does differ materially from the offer.

MR. GREENBURG: Of your understanding?

THE WITNESS: Of my understanding.

MR. TECKLIN: Of your understanding of the offer?

THE WITNESS: Yes.

BY MR. HERZOG:

Q And it is your testimony that at no time did you notify me, either orally or in writing, of this inconsistency; is that correct?

A That is correct.

Q And it is your further testimony that you have no knowledge as to whether your counsel might have done or raised an objection? Is that correct?

A That is correct.

Q Can you tell us whether you know for a fact for yourself whether Mr. Plotkin received or read this particular letter?

A I do not know as a fact that he did.

MR. TECKLIN: Gentlemen, we will take a five minute recess.

MR. GREENBURG: Let me just before we do, one question.

You indicated you received the letter from Mr. Schrager of Blair.

Do you by any chance have a covering letter or anything that he might have transmitted in the September 14 letter to you with you?

THE WITNESS: The covering letter was the same covering letter he sent to the creditors committee.

Looking it over, it looked like he

added three blind carbons to Mr. Plotkin and myself and Mr. Herzog.

MR. GREENBURG: Do you have that letter here?

MR. HERZOG: I would like it produced.

THE WITNESS: Yes.

MR. HERZOG: You say there is a carbon copy or blind copy indicated to Mr. Plotkin?

THE WITNESS: Yes.

(Off the record discussion held.)

MR. HERZOG: I would like to offer this as an exhibit on behalf of the claimant.

MR. TECKLIN: We will make it Respondent's 21, inasmuch as these are respondent's documents.

(Covering letter sent to Mr. Robinson by Mr. Schrager, of Blair, was received and marked as Respondent's Exhibit 21 in evidence.)

MR. ROTHMAN: That is the entire document, the cover letter and the letter.

MR. TECKLIN: The entire document, the covering letter and the copy of the letter of September 14, 1973, and the form of

acceptance of offer.

MR. BUCKSTEIN: Let's recess now.

(Recess taken.)

MR. TECKLIN: Back on the record.

MR. BUCKSTEIN: Mr. Herzog, before you proceed, I have a few questions I would like to ask, particularly with reference to the need for the consent of the creditors committee to/transfer of the stock of Plastimaid to Frank Robinson Advertising, Inc.

Now, if I understood the testimony correctly, you advised us, Mr. Robinson that on a number of occasions, both orally and in writing, you or Mr. Plotkin had requested that Mr. Herzog get the consent of the creditors committee to this transaction, the transfer of stock of Plastimaid to Frank Robinson, Inc.

MR. ROTHMAN: It is the other way.

THE WITNESS: It was the converse that we were trying to effect.

The release of Frank Robinson Adversting, Inc.'s stock.

MR. BUCKSTEIN: Okay.

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AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

ROBERT P. HERZOG

AND

FRANK ROBINSON

CASE NO: 1310-0350-74

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above named Parties, and dated August 27, 1973, and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

1. FRANK ROBINSON, hereinafter referred to as RESPONDENT, shall pay to ROBERT P. HERZOG, hereinafter referred to as CLAIMANT, the sum of FIFTY THOUSAND DOLLARS ($50,000.00).

2. The agreed to compensation of the Arbitrators totaling NINE HUNDRED DOLLARS ($900.00), shall be borne by RESPONDENT. Therefore, RESPONDENT shall pay to the American Arbitration Association the sum of FOUR HUNDRED FIFTY DOLLARS ($450.00) for that portion of said compensation still due.

3. The administrative fees of the American Arbitration Association totaling ONE THOUSAND ONE HUNDRED FIFTY DOLLARS ($1,150.00), shall be borne by RESPONDENT. Therefore, RESPONDENT shall pay to CLAIMANT the additional sum of EIGHT HUNDRED FIFTY DOLLARS ($850.00) for that portion of said fees previously advanced by CLAIMANT to the Association, and RESPONDENT shall pay to the American Arbitration Association the sum of THREE HUNDRED DOLLARS ($300.00) for that portion of said fees still due the Association.

4. RESPONDENT shall pay to CLAIMANT any and all out-of-pocket expenses incurred or to be incurred by CLAIMANT, in connection with the perfecting of the collateral, including, but not limited to, recording costs, and, if necessary, the sale by CLAIMANT of the said collateral deposited by RESPONDENT with CLAIMANT under the "Offer" dated August 27, 1973.

5. CLAIMANT is hereby stayed, until January 3, 1975, from selling, liquidating or otherwise encumbering or disposing of the collateral.

6. RESPONDENT shall have the right, on or before 5:00 P.M. Eastern Standard Time on January 3, 1975, to pay over to CLAIMANT, by cash or certified or bank teller's check, the sums described in paragraphs 1 through 4 inclusive hereof, and upon such payment, CLAIMANT shall return to RESPONDENT the collateral together with such instruments of assignment and transfer as may be necessary to vest in RESPONDENT title to the collateral.

7. In the event RESPONDENT fails to make payment to CLAIMANT, pursuant to paragraph 6 hereof, then, on or after January 4, 1975, CLAIMANT may sell, transfer, encumber or otherwise dispose of the collateral with the proceeds thereof to be paid and utilized as follows:

First - To pay all out-of-pocket costs incurred in connection with the disposition of the collateral.

Second - To pay to CLAIMANT the sum provided for in paragraphs 2 through 4 hereof.

Third - To pay to CLAIMANT the sum of FIFTY THOUSAND DOLLARS ($50,000.00).

Fourth - To pay the excess, if any, to RESPONDENT.

8. In the event that a sale or disposition of the collateral generates funds that are insufficient to pay the items described in paragraphs 1 through 4 above, then RESPONDENT shall pay to CLAIMANT the amount of such insufficiency.

9. RESPONDENT shall have no liability to CLAIMANT under the Offer, except to the extent set forth in this AWARD.

10. This AWARD shall not be deemed or construed to affect the rights, if any, of any persons under the Agreement dated October, 1972, between Frank Robinson, Frank Robinson Advertising Inc., Plastimaid Inc. and the Creditors Committee and General Unsecured Creditors as described in that Agreement.

11. This AWARD is in full settlement of the issues tendered by the Demand and by the Counterclaim to this Arbitration.

DATED: November 27, 1974.

MARK A. BUCKSTEIN

GARY J. GREENBERG

DAVID L. TECKLIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -X

Civil Action File
No. 75 Civ. 21 (LFM)

In the Matter of the Arbitration between

ROBERT P. HERZOG

Petitioner

A F F I D A V I T

-against-

FRANK ROBINSON

Respondent

- - - - - - - - - - - - - - - - - - - -X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

BERNARD RACKEAR, being duly sworn, deposes and says:

I am a member of Bernard Rackear, Professional Corporation ("BRPC"), attorneys for the respondent, Frank Robinson ("Robinson").

I make this affidavit: (a) in opposition to the motion of the Petitioner, Robert P. Herzog ("Herzog") to confirm a certain Award dated November 27, 1974 ("Award") made in an arbitration between Herzog and Robinson; and (b) in support of Robinson's motion to vacate said Award. The arbitration was held under the supervision of the American Arbitration Association ("AAA"), and hearings were held in New York on July 15, 1974, July 29, 1974 and July 30, 1974.

Deponent makes this affidavit rather than Robinson because Robinson resides in California and Robinson is not available nor within this state. Deponent has personal knowledge of all matters recited herein happening after July 5, 1974, the date that BRPC was retained as Robinson's New York counsel. I base the statements in this affidavit as to all matters prior to July 5, 1974 on (a) testimony given by the parties and by witnesses in the arbitration proceedings; (b) on documents given to BRPC by (i) Robinson, (ii) by Daniel L. Rothman, Esq. of Dolin & Rothman, Esqs., (Robinson's present California counsel, also retained July 5, 1974) which were in the file of Gary A. Plotkin, Esq. of Plotkin & Saltzburg, Esqs., (Robinson's California counsel before July 5, 1974) (iii) the AAA; and (c) upon conversations with Robinson, all of which I believe to be true.

The Award (Exhibit I, annexed hereto), which Robinson opposes and seeks to vacate, provides that Robinson shall pay to Herzog $50,000 (¶1). In addition, it assesses against Robinson the compensation of the arbitrators of $900 (¶2), the AAA administrative fees of $1,300 (¶3), and Herzog's out-of-pocket costs to perfect and sell (if necessary) certain collateral hereinafter described (¶4). It further permitted Robinson until 5:00 P.M. on January 3, 1975 (¶5, ¶6) to make such payments, failing which Herzog is permitted to sell the collateral and apply the proceeds to satisfy the foregoing payments and assessments with any excess to be paid by Herzog to Robinson (¶7) and any insufficiency to be paid by Robinson to Herzog (¶8). Further, the Award provides that Robinson shall have no further liability to Herzog under a

certain "Offer" dated August 27, 1973 (¶9) (Exhibit II) and that the Award does not affect the rights of any persons under an Agreement dated October, 1972 (¶10). Finally, the Award states it is in full satisfaction of the issues tendered by the Demand (Exhibit III) and by the Counterclaim (Exhibit IV) (¶11).

Deponent submits that the Court should deny confirmation of the Award. The Court should instead vacate the Award by reason of the misconduct and misbehavior of the arbitrators within the meaning of Section 10(c) of Title 9, United States Code; and because the arbitrators exceeded their powers, and so imperfectly executed them that a mutual, final, and definite Award upon the subject matter was not made within the meaning of ection 10(d) of Title 9, United States Code.

In amplification of the foregoing and in broad outline:

(A) the arbitrators' misconduct and misbehavior which prejudiced Robinson's rights include:

(i) the failure to postpone the hearing (or to dismiss the proceeding without prejudice) upon Robinson's motion to permit the joinder of necessary parties. These parties included, inter alia, the creditors who purportedly accepted the "Offer" upon which the arbitration was based, Robinson's wife who also signed the "Offer", and who has a community property interest in the property pledged thereunder, the debtor whose obligations were to be compromised by the "Offer", and the trustees, creditors' committee and accepting creditors under a previous agreement of October, 1972 (referred to in the Award) whose rights were to be compromised by the "Offer";

(ii) the failure to postpone the hearing, upon letter request and motion, for a period of at least 3-4 week to permit Robinson's newly substituted counsel to prepare for the arbitration;

(iii) the failure to order, as requested by Robinson, the depositions of both Herzog and Robinson's former counsel, Gary Plotkin, the drafters of the "Offer", to be taken prior to the hearing on July 29 in New York and California respectively;

(iv) the failure to permit Robinson to counterclaim for the return of collateral given under the previous Agreement of October 1972 ("Moratorium Agreement"), which was to be of no force and effect if the "Offer" was accepted;

(v) the failure to dismiss the proceeding upon motion when it appeared that the purported accepting creditors (all of whom did not receive the "Offer") based their "acceptances" on a summary of the "Offer" which Herzog stated was "incorrect" in at least one significant respect and which contained significant omissions and ambiguities;

(B) the arbitrators exceeded their powers, inter alia, by:

(vi) awarding an apparent forfeiture and penalty of $50,000 bearing no relation to actual damages suffered;

(C) the arbitrators imperfectly executed their powers so that a mutual, final and definite award upon the subject matter submitted was not made, inter alia, by:

(vii) the failure to permit the joinder of the necessary parties set forth in (i) above so that further litigation would be avoided and so that these parties would be bound by the terms of the Award to be rendered which would include a provision similar to paragraph 9 of the Award which would relieve Robinson of any claim of further liability to said parties;

(viii) the failure to specify the manner in which Herzog would dispose of the $50,000 awarded, and which of various classes of creditors were entitled thereto;

(ix) the failure to provide that such $50,000 awarded was to be credited against creditor's claims, and by failing to take necessary procedural steps to bind said creditors against further claims;

(x) by failing to rule on the rights of the parties to the Agreement of October 1972 and to take the necessary procedural steps to bind said parties.

To permit an understanding of the foregoing, I identify below the parties to the arbitration and set forth a chronological recitation of the facts giving rise to the arbitration together with the proceedings at the arbitration. The parentheses following a statement refers (a) to the page of the transcript of the proceedings if in arabic numerals, (b) to an Exhibit introduced at the arbitration, if proceeded by "Ex", (claimant's exhibits were marked by capital letters (from A1 — S) and respondent's exhibits were marked by arabic numerals (from 1-23)), (c) to Exhibits annexed hereto if in roman numerals and (d) to the particular document so listed in the Notice of Motion to which this affidavit is attached if in lower case letters.

The Parties

The "Demand For Arbitration" (III) identifies Herzog as an "Escrowee Under Agreement", a "writing, dated August 27, 1973", (the "Offer") (II). Herzog appeared at the arbitration solely as a stakeholder; he did not claim to appear in any other capacity. Herzog is a New York attorney.

Robinson is the President of Frank Robinson Advertising, Inc., ("FRA") and President and Chairman of the Board of Plastimaid, Inc. ("Plastimaid"), both California corporations (Ex. B, 391). Robinson is also the principal stockholder of both FRA and Plastimaid (Ex. B, ¶7). Plastimaid manufactures kitchen, health, beauty aid and leisuretime products. FRA marketed these products by "guaranteed sales" through leading chain and department stores, i.e. FRA accepted return of merchandise not sold by its customers (105). FRA arranged advertising for these products principally on radio and television.

The Moratorium Agreement

By the summer of 1972, after an unsuccessful Christmas and spring season, both FRA and Plastimaid were experiencing financial difficulties in cash flow. FRA's assets (principally inventory and accounts receivable) exceeded $2.3 million; FRA's total liabilities exceeded $1.8 million which included taxes payable of $ .3 million, bank loans of $ .2 million and accounts payable of $1.3 million (Exhibits A & C). FRA owed approximately $1.2 million of these accounts payable to radio and television stations ("Media Creditors"). FRA owed the other $ .1 million to "straight creditors" such as the landlord and the telephone company (107).

In October 1972, FRA and certain of its Media Creditors ("Moratorium Creditors") (111, 112) entered into a Moratorium Agreement (Ex. B) which provided, inter alia, for 100% payment of all claims of Moratorium Creditors on an installment basis over the following year (Ex. B, ¶8). Creditors with claims of $1,000 or less, and those who reduced their claims to $1,000, were to be paid forthwith (Ex. B, ¶8b). So long as scheduled installment payments were made the Moratorium Creditors agreed not to bring suit to enforce their claims. (Ex. B, ¶15)

FRA's assets (principally inventory and accounts receivable) were hypothecated as security against default under the Moratorium Agreement subject to a prior lien of $328,000 in favor of the Bank of California (Ex. B, Preamble, ¶5).

Plastimaid joined in the Moratorium Agreement as a "Guarantor" (Ex. B, ¶6). Robinson pledged his shares of FRA and Plastimaid as collateral security without personal liability (Ex. B, ¶7, signature). A creditors' committee ("Committee") was established under, and was a party to, the Moratorium Agreement. Herzog and James A. Jurist ("Jurist"), the chairman of the Committee, acted as trustees and disbursing agents under the Moratorium Agreement and as pledge holders of the security pledged by FRA and Robinson. Herzog also acted as counsel and secretary to the committee (Exs. B, ¶1, 2, 7; Exs. D, E, E-1, F). Herzog was not a creditor of FRA.

The Moratorium Agreement also contained an arbitration clause permitting arbitration in New York or Los Angeles. This is

significant because the Moratorium Creditors, the Committee, FRA, Plastimaid, Jurist and Herzog could have been joined in this arbitration.

The Moratorium Agreement stated it was to become effective when it was consented to by creditors holding at least "80% in dollar amount" of the media debt (Ex. B, ¶3). Herzog thereafter wrote all Media Creditors to secure such consents (118, Ex.C). The parties conceded at the hearing that the Moratorium Agreement went into effect (113).

After payment in full to the smaller creditors (132) and installment payments aggregating approximately $300,000 (393, 395), or 24% of the total media debt, FRA defaulted in the Moratorium Agreement. Herzog gave the required (Ex. B, ¶17) notice of default in July 1973 (Ex. G, 146), and thereafter traveled to California (152) to enforce the rights of the Moratorium Creditors with respect to the security pledged thereunder (Ex. H).

The Offer

Shortly after arrival Herzog met with Robinson's counsel, Gary Plotkin ("Plotkin"), with a view to satisfying the Moratorium Creditors (153). After an examination of FRA's financial condition, Herzog and Jurist in telephone consultation determined that a liquidation of FRA and Plastimaid would not produce significant additional monies for the Moratorium Creditors (Ex. M).

Accordingly, over the weekend, Herzog negotiated with Plotkin and Robinson for an alternative to liquidation (154, 397). This negotiation resulted in the four page Offer ("Offer") (II, Ex. L) dated August 27, 1973, under which the arbitration involved herein arose.

Herzog and Plotkin together (Ex. L, 167, 168) dictated the "Offer" and the documents (promissory note, apartment deed, assignment of lease, escrow receipt referred to below) ancillary thereto at Plotkin's office in Robinson's absence (169) under the time pressure of Herzog's "deadline of making an airplane" (161, 168). Then, under the same time pressures (179, 401), these documents were then signed by Robinson and (as to the collateral and without personal liability) by Robinson's wife, Mari-Jo. Neither Herzog, Jurist, the committee, FRA nor any other person subscribed to the "Offer"; Herzog signed an Escrow Receipt (Ex. 15).

Before I summarize the text of the "Offer", it is important to note here that FRA's creditors did not receive a copy of the "Offer" (243, 244), nor any of the ancillary documents. Instead, Herzog prepared, and mailed to the creditors on September 14, (180), a brief summary of some of the terms of the Offer (V, Ex. M) together with a one-page consent form (VI, Ex. O) upon which each creditor could signify his acceptance and his choice of which of two alternative plans of payment to accept. In Herzog's words:

"This letter which was sent out was not meant to be anything more than an advice to creditors and a synoposis of the offer that Mr. Robinson made and an endeavor to solicit their cooperation to making that offer become effective." (183)

"The offer was not sent because it was merely an offer. It wasn't a contract. It didn't become binding until the sufficient requisite number agreed. (244)

And, therefore, it was deemed only appropriate that a summary of what was made was being offered in dollars and cents be sent out." (244)

"And I don't see what this letter, which is an inartistic attempt apparently to communicate something to creditors has to do with the agreement which is in writing, and which is the contract that is under dispute. Not the letter I sent creditors." (267)

The foregoing and the following is, of course, significant because it goes to the question as to whether there was a meeting of the minds which ripened into an agreement.

A comparison of the "Offer" (Ex. L) and the summary (Ex. M) will disclose that the summary does not accurately set forth the terms of the offer but contains significant omissions, ambiguities and differences. For example, Herzog testified at the arbitration hearing that his summary was "incorrect" in at least one significant respect (253), i.e. the summary (Ex. M) indicated that FRA would be the obligor of certain promissory notes. Herzog testified that Robinson was to be the obligor.

Moreover a comparison of the "Offer" (Ex. L) and the consent form (Ex. O) will disclose that the consent form also contains significant omissions and ambiguities. For example the "Offer" provides for arbitration in New York or Los Angeles, the summary (Ex. M) does not specify the venue of the arbitration and the consent form (Ex. O) does not have a clause providing for arbitration.

The "Offer" is addressed to FRA's 'presently existing creditors" and offers them "in full settlement, satisfaction, remise, release and discharge" of their claims a choice of either; (a) an additional and immediate 10% cash payment, or (b) an additional and immediate 5% cash payment plus a further 20% deferred payment represented by non-interest bearing promissory notes payable by March 30, 1975. In calculating the payments the stated percentages were to be applied to the amount of the individual creditor's claim as it originally existed in October 1972 (the date of the Moratorium Agreement) rather than the amount (generally a lesser sum due to the payments aggregating 24% made under the Moratorium Agreement) of the claims as they existed in August 1973.

As "evidence of" Robinson's "bona fides" Herzog required (155) Robinson to deposit with them $50,000 in the form of a promissory note (Ex. K) which was secured by a deed to the Robinson apartment in a condominium (Ex. J) and an assignment of the Robinson lease at another location (Ex. I), both in Hawaii. The "Offer" provided that if Robinson failed to deposit the necessary cash and notes (it was disputed at the arbitration

whether FRA or Robinson would provide the cash and notes) to effectuate the offer upon its acceptance, that the promissory notes and collateral would be "forfeited" to the creditors "to the extent of $50,000 after expenses" and Robinson was entitled to a refund of the excess "after reasonable expenses".

The "Offer" by its terms provided that it would expire and be of no effect whatsoever unless the required creditors' acceptance was obtained by November 30, 1973. Herzog made no claim that this date was extended. There was considerable dispute as to whether "acceptance" required: (a) a specific number of creditors (regardless of the dollar amount of claims); (b) creditors (regardless of the number) holding a specific dollar amount of claims; or (c) both (a) and (b). This dispute arose in part because of the phrasing of the "Offer". It is variously stated:

> (i) "The above offer is conditioned upon acceptance by eighty percent (80%) of the amount of creditors as at the date hereof." (p 2)
>
> (ii) "In the event acceptances of less than eighty percent (80%) of the amount owed creditors is obtained. . ." (p 2)
>
> (iii) "In the event eighty percent (80%) of the creditors. . . accept the offer." (p 2)
>
> (iv) "In the event the requisite number of creditors do not accept the said offer. . ." (p 2)
>
> (v) "In the event eighty percent (80%) of the creditors accept the within offer. . ." (p 3)
>
> (vi) ". . . until and unless, said offer is accepted by the requisite amount of creditors" (p 4)
>
> (vii) "In the event this offer is accepted by the requisite number of creditors. . ." (p 4)

Indeed Herzog's summary of September 14, 1973 (Ex. M) did not clarify this ambiguity:

> (viii) ". . . payable upon acceptance by the requisite amount of the creditors" (p 1)
>
> (ix) ". . . payable upon acceptance by the requisite amount of the creditors" (p 2)
>
> (x) ". . . accepted by the requisite amount of creditors. . ." (p 2)
>
> (xi) ". . . the committee must receive acceptance by creditors. . . of no less than 80% of the amount owed" (p 2)
>
> (xii) "In order for the substitute offer to become effective, 80% of the amount of creditors must accept same." (p 3)

At the arbitration hearing Herzog contended (165) that "it was always the intent" that the number of acceptances be conditioned "upon 80% of the dollar amount", but stated that "there was not great discussion about that" (176). Jurist, who testified for Herzog, did not recall (545, 546, 548) any discussion of nose count or dollar amount in the several telephone conversations he had with Herzog from August 24-27, 1973. Robinson contended that the acceptance required consent both of 80% of the "number of creditors" (397 ff) and 80% of the "dollar amount" of claims (398, 399) with Robinson having the right to waive the dollar amount requirement (399) (Ex. L, p2). Plotkin's affidavit (Ex. 19) supported the Robinson contention stating that "eighty percent (80%) consent of the creditors in number and dollar amount was necessary.

The requirement for acceptance was crucial because, as Herzog finally admitted (388) at the hearing, 80% in number of the creditors did not accept the "Offer". Whether acceptance by creditors holding 80% in dollar amount of claims was achieved was in dispute at the hearing.

The "Offer" contained an arbitration clause which likewise was conditioned upon acceptance "by the requisite number of creditors." Arbitration thereunder could be had in Los Angeles County or New York County.

The "Offer" further provided that it was "not intended to alter, modify, change or amend" the "Moratorium Agreement or any of its provisions, until and unless, said offer is accepted by the requisite amount of creditors."

Other provisions of the "Offer" stated:

(i) that Frank Robinson would submit a statement of his personal net worth under oath;

(ii) that accepting creditors would release Frank Robinson from any and all personal liability, as to FRA and Plastimaid;

(iii) that Robinson would provide the Creditors' Committee with a report of the condition of FRA and Plastimaid prepared by the accountants for the committee; and

(iv) that accepting creditors agree to return to Robinson the Plastimaid stock pledged under the Moratorium Agreement.

As stated above, Herzog on September 14, sent a summary (Ex. M) of the "Offer" and an "acceptance" form (Ex. O) to the creditors who were requested (Exs. M, O) to return the "acceptance" to Herzog.

While in New York on November 19, 1973, Plotkin met with Herzog at Herzog's office (Ex. 19). At that time Herzog gave (192, 212, Ex. 19) to Plotkin a photostatic copy (Ex. 12) of a spread sheet on which Herzog had made notations of the "acceptances" received. Plotkin's affidavit (Ex. 19) states that this report showed that the "requisite eighty percent (80%) had not yet been obtained". It is undisputed that on November 19, the spread sheet did not show 80% creditor "acceptance" whether with respect to head count, to dollar amount owed the creditors, (290, 511), or to both head count and dollar amount. On November 19, the spread sheet showed "acceptances" of 78.88% in dollar amount (512) and approximately 70% in number. Herzog stated he informed Plotkin that he "had the necessary amounts at that time, either promised to me en route or actually in my hand." (211)

Herzog introduced in evidence (209) at the hearing (193) the "spread sheet" (Ex. N) on which Herzog had made further notations of six purported "acceptances" entered since November 19 (Ex. O-1 to O-3; O-7, O-9). With these additional "acceptances" the total <u>number</u> of acceptances approximated 74% and the <u>dollar amount</u> of acceptances approximated 83% (201). Herzog was not able to state the date when these further notations were made (189, 190, 289, 290). The vast majority of the "acceptances" (all except three (Ex. O-4 to O-6)) did not bear any indication of date of receipt. Herzog did not open the mail and was similarly unable (297) to state the date on which the additional purported "acceptances" were received, but he maintained that these additional "acceptances" were received before November 30 (310, 313).

Herzog did not before, on, or after November 30, 1973 give any written notice that creditors "acceptance" had been achieved (Ex. 19, 216, 217). On January 9, 1974, Herzog wrote (Ex. 9) Plotkin claiming that Herzog had advised Plotkin on November 19, 1973 that 80% of the creditors agreed to accept the offer. Plotkin, on January 17, 1974, wrote (Ex. 10) Herzog in denial stating that Herzog on November 19 was unable to furnish Plotkin "with sufficient acceptances to equal the 80% of the creditors as set forth in the offer."

The Arbitration Proceedings

Herzog responded (234) to Plotkin's letter by preparing and mailing to Robinson (and filing with the AAA on February 26, 1974) a "Demand for Arbitration" (III) dated February 4, 1974, in which he claimed $50,000 plus expenses. Herzog identified himself therein as an "Escrowee Under Agreement" and a "Party to an Arbitration Agreement" "dated August 27, 1973" (Offer) which he asserted was in "Breach". Herzog did not attempt to join Mari-Jo Robinson, FRA, Plastimaid, the Committee, Jurist nor any of FRA's creditors as parties to the Arbitration proceeding. Herzog requested a hearing in New York.

By letter to the AAA dated February 19, 1974 (Ex. 11), Plotkin's Los Angeles law firm asked that the Arbitration be stayed because fewer than 80% of the creditors subscribed to the Offer and that the agreement was therefore a nullity. The letter also submitted that if arbitration was held, the venue thereof should be in Los Angeles County.

Herzog, on March 7, 19[illegible] wrote (e) the AAA in support of New York venue. He further stated that the question of whether "80% of the creditors consented to the offer. . . is properly determinable in arbitration". The AAA wrote on March 11, that it intended to proceed with the arbitration unless stayed by court order, or unless otherwise requested by both parties. On April 9, the AAA wrote (f) all parties that its Administrator had determined that the appropriate locale for arbitration was New York City. By letter of April 30, 1974 the AAA stated that it had appointed a panel of three arbitrators for the proceeding and, on May 1, 1974, the AAA mailed Calendar Forms for May and June to the parties to ascertain available dates. Plotkin, on May 7, (16, 17), noted that he would be on trial in May and June. He stated he would be in Bermuda for the Commercial Law League Convention commencing July 6, 1974 (which Herzog also attended) and therefore suggested that the Arbitration be held on July 15 and July 16. Herzog, by letter dated May 21, 1974 (18), stated he would consent to a July 16 and 17 trial date provided those dat[illegible]re made "peremptory, final and not further adjournable against" Robinson. Plotkin agreed to this condition by letter of May 28 (20). By letter of June 17, (k) the AAA set the hearing for dates for July 15 and 16 and, due to resignations of two arbitrators constituted a new panel to be composed of three lawyers, David L. Tecklin, Mark A. Buckstein and Gary J. Greenberg. Herzog on June 18 wrote to each arbitrator advising that the hearing date was to be "non-adjournable and peremptory as against" Robinson.

At or about July 1, Robinson asked Plotkin about preparing for the arbitration (23). Plotkin advised him that he intended to take the file to Bermuda where Plotkin and Herzog would attend the same convention, that Plotkin would review the file there, and thereafter meet with Robinson in New York on July 13 or 14 to prepare for the hearing. "It then became apparent" to Robinson "that the situation, being as serious as it was, required adequate representation," which Plotkin "would be unable to establish" (23). Robinson consulted with other counsel and on July 5, 1974 (3, Ex. 1) he retained Daniel L. Rothman, of the Los Angeles firm of Dolin & Rothman, who was substituted for Plotkin. BRPC was thereupon associated with Mr. Rothman as New York counsel (Exs. 1, 3). Rothman mailed Notice of Substitution of Attorney both to the AAA (Ex. 1) and to Herzog (Ex. 3) and demanded from Herzog immediate inspection of the purported creditor "acceptances" (Ex. 3). On July 8, AAA acknowledged receipt of the Substitution and reminded all parties that the hearing was set for July 15 and 16, 1974 (Ex. 2).

Rothman and BRPC soon determined the complexity of the case and ascertained that neither a factual resume nor research memoranda had been prepared (4, 5, Ex. 5). Accordingly, BRPC on July 9, hand delivered to the AAA a written request for a one-month delay in hearing date to August 12 or 13 (VII, Ex. 4) which request was denied. The AAA wr on July 10 (O) "the Arbitrators have unanimously decided to go ahead. . . with the hearings."

Meanwhile, Rothman in Los Angeles contacted and hand delivered a letter (8, Ex. 5) to Plotkin's office on July 10, 1974, to secure the testimony of Plotkin who was still in Bermuda. Rothman listed the following areas in which Plotkin's testimony was vital:

> 1. To help explain ambiguities and uncertainties in the "offer" upon which the proceeding is based.
>
> 2. Conversations and understandings between Plotkin and Herzog which may help determine the actual intent of the language of that document.
>
> 3. Testimony regarding the joint drafting of the document by Plotkin and Herzog.
>
> 4. Conversations, correspondence and understandings regarding the matter of acceptance by creditors, which conversations would have occurred during November 1973 and thereafter.

and stated:

"If the hearing proceeds as scheduled, I think it vitally important to the interests of the client that Mr. Plotkin be present and available to give testimony." (Ex. 5, 10). Plotkin refused (15).

On July 11, Rothman was advised by Herzog's call from Bermuda that Herzog would not consent to a continuance and that Herzog would not produce the consents for inspection before the date of the hearing, July 15 (10). During the evening of Friday, July 12, Rothman suffered a "syncopal episode" (Ex. 6) and was admitted to the Coronary Care Unit of the UCLA Medical Center in

Los Angeles. Rothman remained in the UCLA Medical Center until July 17. I learned of Rothman's hospitalization on Saturday, July 13, (10) and attempted that day without success to call the AAA Tribunal Administrator to apply for an adjournment (13). I did reach Herzog at his office and requested his consent to an adjournment which Herzog denied (13). Herzog also refused to permit me to come to his office that day or on Sunday, July 14, to examine the purported consents (14).

Robinson thereupon flew in from California and appeared at the hearing on July 15, at which time I moved to adjourn the hearing for three weeks (16) based on: (a) Robinson's right to have counsel of his choice and his right to have the case thoroughly prepared; (b) Mr. Rothman's illness; (c) the necessity to prepare the case; and (d) the necessity to depose Plotkin. Herzog opposed the adjournment (28). The arbitrators adjourned the hearing for two weeks to July 29 and 30, stating: "There will be no further adjournments on behalf of the Respondent, and any requests will be denied." (33). They directed that Herzog make the consents available for inspection at his office (36). Before the hearing adjourned, Robinson's counsel invited the arbitrators' attention (38-40) to the question as to whether sufficient consents were obtained to meet the precondition for arbitration. The arbitrators' attention was also invited to the failure of joinder of necessary parties: "We don't believe all the parties to this agreement are before this tribunal. . . Mr. Herzog does not appear as a creditor, he appears as a" stakeholder. "He has no authority

to speak for any of the creditors. . . I think that you have an incomplete, defective proceeding, at this point." (40, 41). The arbitrators requested that a brief be submitted on July 29 on each of these points. The hearing adjourned shortly thereafter with no testimony on the merits having been taken.

Following the hearing on July 15 and pursuant to the arbitrators' direction, Herzog permitted Robinson and his counsel to examine the acceptances. Many were questionable and suspicious, i.e. one was unsigned, some were xerox copies of signatures, another was in the form of a letter and not on the acceptance form, one gave evidence of having its date advanced from December to November. On July 17, BRPC wrote the AAA (Exhibit VIII annexed hereto) requesting that the arbitrators issue an order permitting respondent (a) to depose Herzog in New York, and (b) to depose Plotkin, who was willing to be deposed in Los Angeles, both depositions to be held before July 29. Herzog, by letter of July 19, opposed these depositions. The arbitrators thereafter denied both requests.

At the beginning of the hearing on July 29 respondent again raised the threshold questions as to whether the proper and necessary parties had been joined in the proceeding (52) and

whether there were sufficient consents within the meaning of the "Offer" permitting the matter to be arbitrated (53-58). Respondent submitted memoranda to the arbitrators on these points (54, 59). The brief on joinder pointed out that joinder was feasible and argued that failure to permit such joinder would be a ground for vacating the arbitration. It further stated:

> "It would seem elementary procedural due process that where, as here, there is a dispute involving the effect of a purported agreement and the interpretation thereof, that at the very least all of the parties (offerors and purported acceptors) to the purported agreement are necessary parties to the dispute and must receive both (a) notice of the initiation of proceedings and (b) an opportunity to participate before the tribunal which is to rule on the effect thereof. If all parties are not joined, those parties not before the tribunal would not be bound by the award of the tribunal. Moreover, those parties before the tribunal might be exposed to double, multiple or otherwise inconsistent obligations by reason of conflict between the award of the tribunal and judgments of other forums [in] which parties who were not joined may seek relief."

Respondent moved (58) (a) that the proceeding be adjourned to give an opportunity to join other necessary parties (Mary-Jo Robinson, "accepting" creditors, FRA, Jurist) into the proceeding or (b) to dismiss the proceeding without prejudice. Moreover, respondent argued that there was no meeting of the minds between "Offeror" and "accepting creditor", and therefore the "Offer" did not mature into an agreement. This followed because the "accepting"

creditors did not receive a copy of the "Offer" but merely received a summary thereof which differed in significant respects from the "Offer" (68) and because of the uncertainties and ambiguities in the language, both of the "Offer" and of Herzog's summary. Respondent also argued that the $50,000 "forfeiture" provision was unenforceable as a matter of law against the respondent (70, t).

In the absence of the Offer ripening into an agreement, respondent counterclaimed (IV) for return of the promissory note and collateral (77). Herzog opposed the respondent's motion to adjourn or dismiss by reason of lack of joinder (80).

Before testimony was taken, the arbitrators denied respondent's motion for an adjournment to permit joinder (87) and reserved decision as to whether to dismiss the proceeding for lack of joinder (88). They also reserved decision as to whether the proceeding should be dismissed by reason of fewer than 80% consents being obtained (88). Respondent interposed a general and continuing objection to Herzog's testimony in any capacity other than that of escrowee (98).

Apart from Jurist's testimony (533-553) on Herzog's rebuttal case Herzog was the only witness for petitioner. Herzog's direct testimony (99-227) and his cross-examination (227-382) made up the bulk of the testimony taken at the hearing. Respondent's witnesses were Robinson (direct 390-419, cross 419-497, redirect 497-573, and re-cross 513-519) and Herzog on the Moratorium Agreement (513-533). Robinson also submitted a 3 page affidavit of Plotkin (Ex. 19).

Herzog testified as to the background of the Moratorium Agreement and Offer, the drafting of the Offer, the procedures to secure creditor consent thereto, and the alleged default thereunder. Cross-examination of Herzog pointed up the ambiguities in, and differing constructions of, the "Offer" and summary and raised the questions as to (a) whether the purported consents were actually signed by the purported accepting creditors; (b) the dates of such signing and (c) whether there was a meeting of the minds. During the course of such cross-examination one arbitrator observed that the date of the consents (283) could only be impeached by securing the testimony of the signer thereof and proof by other evidence (284) was ruled out.

When it appeared on cross-examination that Herzog's construction of the Offer could result in Robinson having a liability to creditors in excess of $50,000, one arbitrator (347) asked both parties to stipulate that Robinson's liability, if any, would be limited to $50,000. Rothman pointed out that such a stipulation would not be acceptable to Robinson (348) because Herzog was not in a position to bind the creditors none of whom had been joined in the proceeding. The arbitrators suggested that an award could be limited to the narrow issue of whether Herzog was entitled to the $50,000 but Rothman pointed out that other issues were before the Arbitrators such as whether, if the "Offer" was accepted, the Moratorium Agreement came to an end.

Rothman further argued that if a finding was made that the "Offer" was accepted, in accordance with the terms of the "Offer", and if Robinson defaulted under the resulting agreement, then the arbitrators would be required to determine the amount of the damages by reason of such default, that the $50,000 claimed was a penalty or forfeiture disproportionate to any damage that could be suffered from a breach of the offer, and that it was a penalty (351). With respect to the question of whether the Moratorium Agreement continued in effect, or whether there was a novation, an arbitrator pointed out that because neither FRA nor Plastimaid was a party to the proceedings, that the effectiveness of the Moratorium Agreement was not a question for the arbitrators (358). Rothman reminded the arbitrators that the question about the joinder of parties had been raised and was still pending (358). The colloquy set forth in Exhibit IX annexed hereto then took place (362-377) during which the arbitrators denied Robinson's request to counterclaim for the return of the collateral pledged under the Moratorium Agreement.

Robinson testified as to the conversations preceding the "Offer" and his understanding of the meaning of the "Offer". Robinson also testified (500, 501) as to claim letters received subsequent to November 30, 1973, from, or on behalf of "accepting creditors", making claim for the full amount of the creditor's claim rather than the 10% or 25% thereof due under the "Offer". These letters (Ex. 22, 23) were significant because they tended to show that the creditors had either not accepted the "Offer" or had withdrawn their acceptance. Finally he testified (515) as to 15 lawsuits brought by creditors against FRA since the Moratorium Agreement. Rothman indicated that 32 lawsuits were pending (514).

Herzog was called by Robinson to testify as to certain aspects of the Moratorium Agreement.

Herzog called Jurist in rebuttal to testify about Herzog's phone conversations with Jurist previous to the drafting of the "Offer".

The Arbitrators closed the evidentiary part of the proceeding on July 30 (553). Prior to such cloture, they did not make any ruling on the reserved questions of whether they would dismiss the proceedings as defective because of lack of joinder of necessary parties or whether they would dismiss the proceeding because the precondition of the arbitration clause as to acceptance "by the requisite number of creditors", had not been met.

Briefs were exchanged in the following three months. Herzog waived (553) submitting an opening brief and accordingly Robinson submitted an opening brief to which Herzog responded. Robinson then submitted a closing brief. Copies of respondent's and claimant's briefs are annexed hereto (X, XI and XII).

The proceedings were closed on November 4. The Award dated November 27 was transmitted to the parties on December 4, 1974.

Robinson's rights were prejudiced by the Arbitrators' misconduct and misbehavior.

It is clear that the arbitration proceedings denied overa fairness to Robinson to the prejudice of his rights in at least t following respects:

a) The arbitrators' failure to permit the joinder of necessary parties. - - The arbitrators refused, on Robinson's motion to postpone the hearing or to dismiss the proceeding without prejudice, to permit the joinder of necessary parties. These included the purported "accepting creditors", FRA and Mari-Jo Robinson.

Such a postponement for the purpose of joinder would not have prejudiced Herzog in any respect. Herzog (and the "accepting creditors") were at all times fully secured by the pledge of the "forfeited" property.

By failing to join the "accepting creditors", the arbitrators, to Robinson's prejudice, insured from the outset that the award would lack mutuality in that it would be binding only on Robinson; an award adverse to the accepting creditors could not bind these creditors, all of whom were not parties to the proceedi

Robinson was also prejudiced by the arbitrators' failure to join these creditors because the dispute involved, inter alia, the question of whether required creditor consent in accordance with the terms of the "Offer" had been achieved. This dispute involved not only the question of whether sufficient creditors (either as to head count, or amount owed, or both) had accepted

the "Offer", but also whether there was a meeting of the minds between Robinson and the purported acceptors which matured into an agreement. Herzog, a stakeholder, was obviously incompetent to testify on the subject and there was no testimony by "accepting creditors. By failing to join the creditors, and proceeding post-haste into hearing, the arbitrators in effect foreclosed the testimony of the creditors on these questions.

Moreover, by failing to join these creditors, the arbitrators unfairly limited the scope of the proceeding and placed the hearing in a position that all issues could not be tried. One of these issues was whether the "Offer", if accepted, was thereupon a novation of, and a substitute for, the Moratorium Agreement of October, 1972 to which some, if not all of the "accepting creditors", were parties. This issue also involved the question of whether collateral pledged under the Moratorium Agreement should be returned. When this issue was raised during the course of the hearing, one arbitrator begged the question by observing that the parties were not before them. The Award in effect reserves this question for future decision; in effect the arbitrators shirked their responsibilities to decide the issue. Robinson is thereby exposed to further litigation or arbitration and to double, multiple and possibly inconsistent obligations.

Not only were the accepting creditors not before the arbitrators, but other parties such as FRA, Mari-Jo Robinson, the

Committee, the Trustees and the balance of the Moratorium Creditors should have been joined, in view of the issues before the arbitrators. These issues included whether Robinson or FRA would provide the cash and notes offered under the two payment alternatives set forth in the "Offer", whether the Trustees were to return the security deposited under the Moratorium Agreement, and whether Mari-Jo Robinson's community property interest in the collateral securing the $50,000 promissory note was forfeited.

It is observed that all of the foregoing necessary parties purportedly agreed to either the Moratorium Agreement or the "Offer" both of which provided for arbitration in either Los Angeles County or New York County. Assuming such an agreement to arbitrate, all of these parties could have been joined in the arbitration by mail, without serious problems involving service in other states or jurisdictions. Moreover, to the extent that any of the creditors, upon receiving a demand for arbitration, denied having made the purported acceptance or otherwise moved to stay arbitration, such denial would have assisted the arbitrators and the parties in the determination as to whether the requirements as to acceptance had been met and whether there had been a meeting of the minds.

It will be recalled that the arbitrators, had reserved decision (376) on the question of whether to dismiss for failure of joinder of parties("accepting creditors") and did not rule on the question before closing the hearing. The Award can only be read as a denial of the motion. At the very least the arbitrators upon denying the motion should have thereupon reopened the proceedings to permit the joinder of parties or the taking of testi-

mony of these creditors on the issues of acceptance and meeting of the minds and the other issues raised. (Such a request was made in respondent's opening brief pages 37-40).

b) The arbitrator's failure to postpone the hearing to grant Robinson's counsel sufficient time to prepare for the arbitration, upon letter request and motion timely made, together with the arbitrator's failure under the circumstances to order the deposition of Herzog and Plotkin to be taken before the July 29 hearing. - - Robinson was prejudiced by the arbitrators' refusal to grant a reasonable time for his counsel to prepare and by their failure to grant reasonable discovery.

With respect to preparation, it will be recalled that Robinson, Rothman and Plotkin resided in California, that Robinson engaged new counsel on the eve of arbitration and that shortly after such engagement Rothman, Robinson's Los Angeles counsel was confined for 5 days from July 12 to July 17 to a Los Angeles hospital, during which period he was unable to prepare for the complex arbitration. The arbitrators should have granted the requested 3-4 week adjournment to enable Rothman to prepare the case. There would have been no prejudice to any party by such grant.

With respect to the requested discovery of Herzog it will be noted that the barebone "Demand for Arbitration" gave no inkling of Herzog's claims or testimony. Herzog and Plotkin, in Robinson's absence, were the draftsmen of the "Offer" and Herzog was the sole recipient of the "acceptances". Although requested, Herzog refused to submit to deposition prior to the July 29 arbitration hearing. Under the circumstances, and as requested, the arbitrators should have ordered the deposition of Herzog. There was great inequity in permitting Herzog a "field day" at the hearing, while not permitting Herzog's deposition to be taken prior to the hearing. It will be recalled that Herzog's testimony made up the bulk of the testimony at the hearing.

Robinson submitted at the hearing a three-page affidavit of Plotkin (419) which rebutted some of Herzog's allegations which were revealed during the colloquy on July 15 but, in the absence of knowing all of the disputed facts, this affidavit was necessarily sketchy. The arbitrators, under the circumstance that the respondnet was unable to subpoena Plotkin and in view of Plotkin's willingness to be deposed, should have ordered the requested deposition of Herzog in New York followed by that of Plotkin in California, so that the complete facts could have been placed before the arbitrators.

c) Failure to dismiss the proceeding upon respondent's motion when it appeared that the "accepting creditors" did not receive a copy of the "Offer", but instead based their acceptances on a summary of the "Offer" which Herzog circulated and which he stated was incorrect (253) in at least one significant respect, and which contained significant omissions and ambiguities.

The arbitrators should have dismissed the proceeding on respondent's motion (253) because it was clear that the "Offer" and "acceptance" related to differing rights and obligations, or were each ambiguous in significant respects as to be ineffective in creating an agreement. At best the purported acceptances were a counteroffer, which Robinson did not accept. Robinson is clearly prejudiced by the Award which imposes liability in excess of $50,000 upon him, based on an "Offer" which was never circulated and therefore never accepted.

d) The arbitrators' failure to permit Robinson to counterclaim for the return of the collateral deposited under the Moratorium Agreement, which Agreement Robinson claims was superseded, in the event it was found that the "Offer" was accepted.

Robinson was prejudiced by this ruling of the arbitrators in that he is exposed to further litigation or arbitration and to double, multiple and possibly inconsistent obligations. For a fuller treatment please see the discussion above under failure of joinder. (p 23-25)

The Arbitrators exceeded their powers.

The arbitrators exceeded their powers by awarding to Herzog an apparent penalty and forfeiture in the amount of $50,000. The Award directs that Robinson pay Herzog $50,000, but does not direct that this sum be credited against any obligation that Robinson may have to the "accepting creditors". Indeed, the Award states that it does not affect the rights of parties under the Moratorium Agreement. It is silent as to whether it affects the rights of purported acceptors to the "Offer".

Robinson argued throughout the proceeding that the "Forfeiture Provision" was an illegal and unenforceable penalty under applicable law. The only damage which could be suffered or which could have been contemplated by reason of a breach of the "Offer" was the amount which the respective "accepting creditors" would have been entitled to under the "Offer", plus interest for the loss of use of money. The forfeiture of $50,000 bears no relationship whatsoever to such loss. Thus, the "forfeiture provisions" of the Offer must be seen as a provision for the purpose of injecting fear into Robinson and by way of punishment for default. There was no evidence of any kind that there was any discussion or negotiation between the parties as to the impracticability or difficulty involved in fixing damages, or that the $50,000 forfeiture was an attempt by the parties to reach a

reasonable preestimate of damages. Nor was there any evidence of any kind offered at the arbitration hearing with respect to damages actually suffered.

At the arbitration hearing Herzog testified and argued that in his view "all creditors" (that is, accepting creditors, as well as all other creditors of FRA) were entitled to participate in the $50,000 forfeiture (after compensation which Herzog claimed for his costs and expenses), that the Moratorium Creditors were restored to or retained their rights under the Moratorium Agreement, and/or these creditors may be entitled to pursue Robinson for further performance of the Offer. In other words, Robinson is penalized $50,000 plus costs for breaking his "agreement" and non-Media Creditors to whom he did not even make the "Offer" are somehow entitled to participate in the $50,000; the contract (Offer) under which the forfeiture is made "falls", and the Moratorium Agreement, for which it was a substitute, stands — or perhaps accepting creditors would still have rights to pursue Robinson or FRA or both. If that does not describe a penalty, then there is no such thing. Yet that is precisely what can occur under the Arbitrators' Award.

The Arbitrators imperfectly executed their powers so that a mutual, final and definite award upon the subject matter submitted was not made.

In view of the many complex issues involved in this case, the Award was not a mutual, final and definite award upon the subject matter submitted.

A. The Award is not definite in at least the following respects:

1) Although it was undisputed that Herzog was a stakeholder who purportedly brought arbitration regarding conflicting demands, the Award appears to be absolute in favor of Herzog. There is no direction as to his disbursement of the Award, the identity or class of creditors entitled to participate, nor the manner of such participation. The "Offer" by its terms (p. 3) provides for a forfeiture "to the existing creditors of FRANK ROBINSON ADVERTISING, INC. to the extent of $50,000.00 after expenses." During the arbitration proceedings there was considerable discussion and dispute respecting the meaning of the words "existing creditors". Did these words mean all of the creditors of FRA, all of the Media Creditors, all of the Moratorium Creditors or only those Moratorium Creditors who were purported acceptors of the Offer? The Award is totally silent on this matter, and apparently leaves to the absolute discretion of Herzog the parties entitled to participate in the $50,000 Award.

2) For that matter, under the language of the Award, is Herzog obligated to pay the full $50,000 or any part thereof to anyone? Under the Award, Robinson is directed to pay $50,000 to Herzog without any indication that Herzog would hold said funds for the benefit of anyone else. Assuming that Robinson paid to Herzog the $50,000 together with all other costs and expenses as provided by the Award, is Herzog entitled to retain any part of that $50,000? Herzog testified that there was a balance owing to him from FRA under the terms of the Moratorium Agreement. Is Herzog entitled to deduct that sum from the $50,000? Herzog has unquestionably devoted his time and his efforts as an attorney in the prosecution of the claim through arbitration. Is he entitled to deduct from the $50,000 a reasonable compensation for these services? If these questions are answered in the affirmative, then what effect does such deduction have upon the obligations, if any, of Robinson to the accepting creditors or of FRA and Plastimaid to the Moratorium or other creditors?

3) If the arbitrators intended that the $50,000 be paid to creditors (but which?) to be applied against amounts owed such creditors, then is the payment a credit against the reduced amount owed under the "Offer" or is it a credit against the balance of the original debt owed under the Moratorium Agreement, or neither? Further, if the $50,000 is a payment on account, who is responsible for payment of the balance? Robinson urged the position that if the "Offer" ripened into an agreement, then by the terms thereof, the "Offer" replaced the Moratorium Agreement thus resulting in a novation; and liability thereunder, except to the extent of

$50,000 and reasonable costs, rested with FRA. Herzog, on the other hand, contended that Robinson, not FRA, was obligated for the full performance of the "Offer"; that the "Offer" (having been accepted) had been breached; therefore, the "Offer" "fell" leaving the Moratorium Agreement standing; accordingly, Robinson was to forfeit $50,000, the creditors were restored to or retained their rights under the Moratorium Agreement, and/or these creditors may be entitled to pursue Robinson for the performance of the "Offer". The Award, however, leaves all of these questions unanswered and all of these issues unresolved.

4) One of the major issues raised before the arbitrators was whether the $50,000 forfeiture clause was an unenforceable and illegal penalty (this point is more fully discussed above and in the memorandum of law). Further, that if the forfeiture provision were held to be, under either California or New York law, a valid liquidated damage provision, and thus not a penalty, that such a holding would require the additional conclusion that the $50,000 forfeiture is, and will be, the sole remedy of the creditors; and that no other or greater damages could be awarded for the claimed breach even though the actual damages which the creditors might suffer would exceed the stipulated sum. Yet, the Award is entirely silent as to this major issue.

The lack of definiteness compels a vacating of the Award.

B. The Award is not mutual in that it only binds Robinson and does not bind the other parties to the "Offer".

The Award (¶9) attempts to limit Robinson's liability under the "Offer" to $50,000. However, it would appear that this limitation may turn out to be ineffective and that the Award can only work to estop and bind Robinson. The Award lacks mutuality in that it does not and cannot bind the other parties to the "Offer", the "accepting creditors", none of whom was joined in the proceeding. All of these creditors are free to claim, for example, that Robinson rather than FRA, was to deposit the cash and notes necessary to permit the two alternative payment plans and to claim therefore that Robinson has a personal liability to them in excess of $50,000. They are similarly free to claim that the Moratorium Agreement remains in existence and that they are not obligated to return the security pledged thereunder.

The lack of mutuality compels a vacating of the Award.

C. The Award is not final. - - The Award does not put an end to litigation, but rather encourages it by its avoidance of, and failure to decide the issues presented and by its ambiguities. Indeed in the only respect that the Award purports to be "final", in awarding $50,000 to Herzog (¶1) and permitting him (¶¶5, 6) to foreclose on the collateral to realize this sum, the finality is illusory because of Mari-Jo Robinson's community property interest in the property. Mari-Jo Robinson was not joined

in the proceeding and Herzog would act at his peril, and be subject to her claims, if he took any steps that would prejudice her rights in said collateral.

The lack of finality compels a vacating of the Award.

WHEREFORE, respondent respectfully requests that this court deny confirmation to, and vacate, the arbitration Award.

Bernard Rackear

Swown to before me this
20th day of February, 1975.

Notary Public

GEORGE T. VOGEL
NOTARY PUBLIC, State of New York
No. 60-4107300
Qualified in Westchester County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of the Arbitration
Between

ROBERT P. HERZOG,

Petitioner,

- against -

FRANK ROBINSON,

Respondent

----------X

Civil Action File
No. 75 Civ. 21
Judge MacMahon

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

ROBERT P. HERZOG, being duly sworn, deposes and says:

1. That I am the petitioner herein, fully familiar with all the facts and circumstances, and submit this affidavit in opposition to the cross-motion of the respondent dated February 20, 1975.

2. Petitioner generally denies all of the allegations contained in the voluminous Rothman affidavit, submitted in support of the respondent's cross-motion.

3. No useful purpose will be served by specifically denying each and every allegation. Respondent's affidavit merely carves from the totality of the arbitration, certain portions that, out of context, appear to be beneficial to his argument. Suffice it to say that all of the respondent's contentions and all of the facts he refers to in support of his application, were raised and submitted to the arbitrators, whom along with the totality of the evidence presented, found in favor of the petitioner.

4. The affidavit nowhere indicates or demonstrates misconduct on behalf of the arbitrators, nor that the arbitrators exceeded their powers or that a mutual, final and definite award was not made.

WHEREFORE, petitioner respectfully prays that the respondent's cross-motion be in all respects denied.

Sworn to before me this
4th day of March, 1975.

ROBERT P. HERZOG

CAROLYN ANDREWS
Commissioner of Deeds
City of New York 1-74
Certificate filed in New York County
Commission expires Sept. 1, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration between	
ROBERT P. HERZOG,	75 Civ. 21-LFM
Petitioner,	MEMORANDUM
-against-	
FRANK ROBINSON,	
Respondent.	

MacMAHON, District Judge.

Petitioner seeks an order confirming an Arbitration award, pursuant to Section 9 of the United States Arbitration Act ("Act"), 9 U.S.C. § 9. Respondent cross-moves for an order vacating the award. The petition is here following removal from the state court, pursuant to 28 U.S.C. § 1441, and there is no dispute respecting removal jurisdiction.[1]

The facts surrounding the arbitration are informative. Respondent Frank Robinson, president of FRA, Inc., entered into a moratorium agreement with FRA's creditors in 1972. In the summer of 1973, respondent defaulted on the agreement and, in order to prevent foreclosure, submitted an offer to the creditors on August 27, 1973. The offer, which was to be substituted for the moratorium agreement if

accepted by 80% of FRA's creditors, provided for cash payments to the creditors under alternative plans.

As part of the offer, respondent was required to deposit collateral, consisting of a promissory note, a deed and an assignment of a lease, with the escrowee, Herzog. In the event respondent failed to make payments in accordance with the offer, the collateral would be liquidated and payment made to the creditors in the amount of $50,000. FRA's indebtedness would then be reduced in that amount. The offer further specified that any dispute arising out of it would be arbitrated.

The offer was accepted by the requisite 80% of the creditors, but respondent failed to make the agreed payments. Herzog, as escrowee and authorized representative of the creditors, demanded arbitration on the issue of whether respondent had defaulted on the agreement, thus entitling the creditors to the $50,000 forfeiture payment. After several delays, the arbitration was held in New York City on July 29 and 30, 1974. On November 27, 1974, the arbitrators awarded the forfeiture payment to the creditors and assessed the costs of the arbitration against respondent.

It appears that respondent demanded that the arbitrators join the creditors of FRA as parties to the arbitration. The arbitrators refused, and respondent claims that their refusal constituted gross misconduct and

"exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made."[2] In particular, respondent contends that the failure to join FRA's creditors and make the arbitration award binding upon them renders the award indefinite and indeterminate because the creditors could subject respondent to multiple lawsuits if escrowee Herzog fails to distribute the $50,000 to the creditors.

As the arbitrators properly decided, however, the creditors were not indispensable or even necessary parties to the arbitration. Since Herzog acted as the authorized representative of the creditors in the arbitration, they were bound by the arbitrators' decision. There was, therefore, no need to join the creditors.

Respondent's fear that he will be subject to multiple lawsuits if Herzog improperly distributes the $50,000 is misplaced. Payment to an authorized representative of a creditor is payment to the creditor and discharges the debtor's responsibility pro tanto.[3]

We find, therefore, that the arbitrators acted well within their discretion in refusing to join the creditors and that the nonjoinder in no way made the award indeterminate or indefinite.

Respondent next contends that the arbitrators prejudiced his rights and violated § 10 of the Act because

they only granted a two-week adjournment of the arbitration date, instead of a month which he had requested. Respondent contends that he needed at least a month from July 15, the original arbitration date, in order to depose his former attorney, Gary Plotkin, and escrowee Herzog.

The undisputed facts are that the arbitration was set for July 15 and 16, 1974 by express agreement of both parties. Six weeks before the scheduled date, respondent dismissed his counsel but did not retain new counsel until July 5, 1974. Ten days later, on July 15, the very day set for the arbitration, respondent applied for and obtained an adjournment until July 29 because one of his new attorneys became ill on July 13.

Respondent offers no excuse for his delay in retaining new counsel and admits that he had agreed to the July 15 date. If respondent had promptly retained new counsel after relieving Plotkin, he could have easily deposed the two witnesses by July 15. Moreover, respondent could have deposed the witnesses during the two-week extension from July 15 to July 29.

The law's delay always has been and still remains one of the main reasons for arbitration in the first place.[4] Clearly, the arbitrators not only have discretion to determine whether to grant an adjournment of a scheduled hearing but also have the plain duty to deny a continuance if they believe that delay will not serve the ends of justice. There was no abuse of discretion here.[5]

Respondent's third ground for vacating the award is that the arbitrators made a mistake in law when they upheld the $50,000 forfeiture provision of the offer agreement.

The arbitrators did not support their award with reasons. It is clear, however, that they are not required to do so under the Act.[6] When reasons are not given for an award, it cannot be vacated for a mistaken interpretation of law.[7] We need not consider, therefore, whether the arbitrators correctly interpreted the law applicable to this issue.

We find that respondent Robinson has failed to show any of the grounds for vacating an award provided for in § 10 of the Act. Section 9 of the Act, therefore, requires confirmation of the arbitration award.[8]

Accordingly, Herzog's petition to confirm the arbitration award and enter judgment thereon is granted. Robinson's cross-motion to vacate the award is denied.

Submit judgment within ten (10) Days.

Dated: New York, N.Y.
May 1, 1975

/s/ *Lloyd F. MacMahon*
LLOYD F. MacMAHON
United States District Judge

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In the Matter of the Arbitration
between Robert P. Herzog against
Frank Robinson 75 Civ. 21-LFM

FOOTNOTES

1 Minkoff v. Scranton Frocks, Inc., 172 F. Supp. 870 (S.D.N.Y. 1959).

2 9 U.S.C. § 10(c) and (d).

3 3 Am. Jur. 2d Agency, § 265 at 629 (1962).

4 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

5 Catz American Co. v. Pearl Grange Fruit Exch., Inc., 292 F. Supp. 549, 553 (S.D.N.Y. 1968).

6 Sobel v. Hertz, Warner & Co., 469 F. 2d 1211 (2d Cir. 1972).

7 Sobel v. Hertz, Warner & Co., supra, 469 F.2d at 1216.

8 Saxis S.S. Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577 (2d Cir. 1967).

APPENDIX - PAGE 167

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

In the Matter of the Arbitration
between

ROBERT P. HERZOG

Petitioner

-against-

FRANK ROBINSON

Respondent

- -X

75 Civ. 21 LFM

JUDGMENT

The above named petitioner having moved, pursuant to 9 U.S.C. §9, for an order confirming an arbitration award; and the above named respondent having cross-moved, pursuant to 9 U.S.C. §10 for an order vacating said award; and the proceeding having duly come on to be heard on March 7, 1975 before the Honorable Lloyd F. MacMahon, United States District Judge; and after hearing Robert P. Herzog, petitioner pro se, in support thereof and Bernard Rackear, P.C. by George Vogel of counsel, attorney for the respondent in opposition thereto, and due deliberation having been had thereon; now on reading and filing the memorandum decision dated May 1, 1975, it is

ORDERED, that the application of Robert P. Herzog, Petitioner herein, for an order, pursuant to 9 U.S.C. §9, confirming an arbitration award dated November 27, 1974, be and the same hereby is in all respects granted, and it is further

ORDERED, that the application of Frank Robinson, respondent herein, for an order pursuant to 9 U.S.C. §10, vacating the aforesaid arbitration award dated November 27, 1974 be and the same hereby is in all respects denied, and it is further

ORDERED, that the award of Mark A. Buckstein, Garry J. Greenberg and David L. Tecklin, Arbitrator dated the 27th day of November, 1974, and acknowledged November 27, 1974 and December 4, 1974, be and the same hereby is confirmed; and it is hereby

ADJUDGED AND DECREED, that petitioner Robert P. Herzog do recover judgment upon said arbitration award as against respondent Frank Robinson in the sum of $50,850.00 with interest thereon from November 27, 1975 to date of entry hereof, amounting to the sum of $1,375.00 in all making the sum of $52,225.00, and it is further

ADJUDGED AND DECREED, that the American Arbitration Association do recover judgment upon said arbitration award as against respondent Frank Robinson in the sum of $750.00, and it is further

ADJUDGED AND DECREED, that petitioner Robert P. Herzog do recover of respondent Frank Robinson his costs and disbursements herein to be taxed by the clerk of the court.

Dated: New York, New York
May 12, 1975

/s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

Judgment Entered this 14th day of May, 1975

/s/ Raymond F. Burghardt
RAYMOND F. BURGHARDT

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Robert P. Herzog pro se

by Elizabeth Goldman